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FAMILY FRIENDLY WORKPLACE ACT

APRIL 2, 1997.—Ordered to be printed

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Mr. JEFFORDS, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 4]

The Committee on Labor and Human Resources, to which was referred the bill (S. 4) to amend the Fair Labor Standards Act of 1938 to provide to private sector employees the same opportunities for time-and-a-half compensatory time off, biweekly work programs, and flexible credit hour programs as Federal employees currently enjoy to help balance the demands and needs of work and family, to clarify the provisions relating to exemptions of certain professionals from the minimum wage and overtime requirements of the Fair Labor Standards Act of 1938, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

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39–010

I. Introduction and Purpose

The purpose of S. 4, the Family Friendly Workplace Act, is to ensure that the evolving needs of America's work force are reflected in our Nation's laws. Today, there are more working, single parents and dual income families in America than ever before. S. 4 updates the Fair Labor Standards Act of 1938 in order to assist working people to balance the growing demands of the workplace with the needs of families. S. 4 provides men and women working in the private sector the opportunity to voluntarily choose compensatory time off in lieu of overtime pay, as well as to voluntarily participate in biweekly and flexible credit hour programs.

The U.S. Congress has endorsed the benefits of flexible scheduling on numerous occasions. Unfortunately, public sector employees have thus far been thus far the only beneficiaries of this enlightenment. S. 4 is intended to change this by making flexible scheduling options available to 80 million employees working in America's private sector. This legislation will give hard working men and women the ability to design their work schedules around their family situations. Employers will benefit from more productive and satisfied employees.

In recent polls, Americans have overwhelmingly supported amending the Fair Labor Standards Act to allow for more flexible scheduling options. The American people are not alone in their belief that it is time for a change. President Clinton acknowledged the importance of workplace flexibility, at least for Federal employees, in a July 11, 1994 Presidential Memorandum. The President decreed that "Broad use of flexible work arrangements to enable Federal employees to better balance their work and family responsibilities can increase employee effectiveness and job satisfaction, while decreasing turnover rates and absenteeism." In his 1997 State of the Union Address, the President also recognized that it is time for broader change in the private sector when he proclaimed: "We should pass flex-time, so workers can choose to be paid overtime in income, or trade it in for time off to be with their families." S. 4 is the impetus to that much needed change. This legislation will enable Americans to participate in flexible work schedules so that they can better cope with the challenges of the 21st century.

II. Background and Need for Legislation

A. BACKGROUND

The Fair Labor Standards Act (FLSA)[1] was enacted in 1938. It established standards for minimum wage, overtime, record keeping, child labor and other workplace issues. As originally passed, the FLSA did not extend to public sector employers. The FLSA was amended in 1966 to extend coverage to certain State and local employers and again in 1974 so as to cover all state and local government activities.

[1] 29 U.S.C. §§ 201–209.

The FLSA requires that when a nonexempt employee works more than 40 hours in a seven day period, that employee must be compensated at a rate of one and one half times the employee's regular rate of pay.[2] Certain exceptions to the 40 hour workweek are permitted under sections 7 and 13 of the FLSA,[3] for a variety of specific types and places of employment whose circumstances have led Congress, over the years, to enact specific provisions regarding maximum hours of work for those types of employment. In addition, the "overtime pay" requirement does not apply to employees who are exempt as "executive, administrative, or professional" employees.[4]

Under the overtime pay requirement in the FLSA, overtime pay for employees in the private sector must be in the form of cash wages paid to the employee in the employee's next paycheck. This is contrary to the overtime pay provisions applying to State and local government employees.[5] Section 7(o)[6] provides that State and local governments may provide paid compensatory time off in lieu of overtime compensation, so long as the employee or his or her collective bargaining representative has agreed to this arrangement and the compensatory time is given at a rate of not less than one and one half hours for each hour of employment for which overtime is required.

The difference in the FLSA's treatment of private sector and state and local government employers in the FLSA is explained by the fact that provisions applying the FLSA to the public sector were amended in 1985 and therefore included a recognition that the workplace and the work force had changed greatly since the 1930's when the FLSA was first enacted. In 1985, Congress recognized that changes in the work force and the workplace had led many employees in State and local governments to make compensatory time available and for their employees to choose compensatory time. As this committee explained in including compensatory time for State and local government employees in the 1985 amendments:

> The committee also is cognizant that many State and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements—frequently the result of collective bargaining—reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, we wish to accommodate such arrangements.[7]

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[2] 29 U.S.C. § 207.

[3] 29 U.S.C. §§ 207, 213.

[4] U.S.C. § 213. In order to be exempted from the overtime provisions of the FLSA, an executive, professional or administrative employee must meet the duties test and be paid a salary on a salary basis. 29 C.F.R. § 541.118 Under the salary basis test, an employee is considered to be paid on a salary basis if he or she regularly receives each pay period a predetermined amount constituting all or part of his compensation.

[5] The FLSA applies to any "public agency" which is a State, political subdivision of a State, or an interstate governmental agency. 29 U.S.C. § 207(o)(1).

[6] 29 U.S.C. § 207(o).

[7] Report on S. 1570, Senate Committee of Labor and Human Resources, 99th Congress, First Sess. S. Rep. No. 99–159, p. 8.

Prior to 1974, employees of the Federal government were covered solely by the Title V of the United States of Code.[8] When Congress amended the FLSA in 1974, it also made the FLSA applicable to most employees of the Federal government.[9] However, Congress simultaneously authorized the Civil Service Commission to administer provisions of the FLSA for employees of the Federal Government.[10] Pursuant to that authority, the Civil Service Commission, which later became the Office of Personnel Management (OPM), promulgated regulations for Federal employees.[11]

In 1978, Congress passed the Federal Employees' Flexible and Compressed Schedules Act."[12] The measure allowed Federal executive branch employees, along with employees of certain other agencies, to experiment with alternative work schedules that would meet their personal needs. During the following 3-year period, the alternative works schedules program was monitored by OPM. Congress reauthorized the program in 1982.[13] The program was so successful that in 1985, the Federal Employees' Flexible and Compressed Schedules Act was made permanent.[14]

As a result of the Federal Employees' Flexible and Compressed Schedules Act, Federal agencies may offer compressed work schedules and flexible work schedules to better accommodate their employees' needs.[15] Under a compressed work schedule, full-time employees may fulfill an 80 hour bi-weekly work requirement in less than 10 days by increasing the number of hours in a workday.[16] For example, this allows Federal employees to work on a "9/80 schedule" wherein they work 9 hours each day for 8 days, 8 hours for one day and get the tenth day off. As part of a flexible work schedule program, Federal employees may work "credit hours" in excess of their basic work requirement which they may use to shorten a future workweek or workday.[17]

B. NEED FOR LEGISLATION

Since the enactment of the Fair Labor Standards Act in 1938, there have been considerable changes in our nation's economy, labor market conditions and labor-management relations. One of the greatest transformations has been in the composition of the United States' labor force. More women are working then ever before. According to the Bureau of Labor Statistics, women now account for 46 percent of the labor force. Between 1948 and 1995,

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[8] Under Title V, Federal employees are entitled to overtime compensation. 5 U.S.C. § 5542. In addition, Title V authorized the head of a Federal agency, at the request of an employee, to offer compensatory time off instead of overtime pay. 5 U.S.C. § 5543.

[9] P.L. 93–259; *see* 29 U.S.C. § 203(e)(2)(A).

[10] P.L. 93–259; *see* 29 U.S.C. § 204(f). Note, however, that the Civil Service Commission was not authorized to administer the FLSA to individuals employed by Library of Congress, the U.S. Postal Service, the Postal Rate Commission and the Tennessee Valley Authority.

[11] C.F.R. Parts 550, 551. Although employees of the Federal Government are entitled to be compensated at a rate of one-and-one half times their regular rate of pay for overtime hours, if the employee selects compensatory time instead of overtime, that employee is given compensatory time at a rate of one hour for each hour of overtime worked unless that employee is a member of a union that has reached a different arrangement through a collective bargaining agreement. *See* 5 C.F.R. § 550.114; § 551.531.

[12] P.L. 95–390.

[13] P.O. 97–221.

[14] P.L. 99–196.

[15] U.S.C. § 6120 *et. seq.*

[16] U.S.C. § 6121(5) and § 6127.

[17] U.S.C. § 6121(4) and § 6126.

women's labor participation rates almost doubled from 33 percent to 59 percent.

The increase of women in the work force has had a significant impact on the day-to-day activities of the American family. The "stay-at-home" mom is now the exception rather than the rule. Indeed in 1995, only 5.2 percent of all American families mirrored the traditional "Ozzie and Harriet" family structure of a wage-earning father, nonworking mother and two children.[18] According to the Bureau of Labor Statistics, 62 percent of two parent families with children have both parents working outside the home.

The markup of the American work force has changed dramatically yet few provisions of the FLSA have been updated to reflect those changes. The needs of today's work force are different than the needs of the work force of the 1930's. Although employees are demanding more flexible work schedules and compensation packages, the FLSA and its underlying regulations preclude employers from complying with employee demands.

Because the FLSA prevents employers from accommodating employee requests for greater flexibility in scheduling, employees are being forced to make difficult choices between work and family, often at the expense of the latter. For example, a working mother may wish to modify her regular schedule by working extra hours over a 2-week period in order to take a day of to chaperone her son's field trip to the local zoo. Because the FLSA will not allow that mother to "flex" her schedule beyond a 40 hour work week, unless the mother is able to work four 10 hour days during the week of the field trip, she can not serve as a chaperone without using leave or losing pay. Senator Kay Bailey Hutchison discussed the grave need for change in the FLSA in a hearing before the committee:

> The time has come to give nonexempt employees the same flexibility that salaried, or "exempt" employees presently enjoy and that federal employees have enjoyed since 1978. By untying the hands of employers and employees who may wish to agree to mutually beneficial scheduling arrangements, but who are prohibited from doing so under existing law, the Family Friendly Workplace Act will ensure that the Federal Government will no longer stand in the way of achieving an optimal work environment for each particular workplace and each particular worker.[19]

This demand for a change in the existing law was exhibited in a recent poll conducted by Penn + Schoen for the Employment Policy Foundation. The poll indicates that 88 percent of all workers want more flexibility through scheduling flexibility and/or the choice of compensatory time.[20] Another national poll revealed that 65 percent of Americans favor changes in labor law that would

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[18] Bureau of the Census, "Money Income in the United States: 1995," September 1996.

[19] Hearing on S. 4, the Family Friendly Workplace Act before the Senate Committee on Labor and Human Resources, Subcommittee on Employment and Training, 105th Cong., 1st Sess, February 4, 1997 (to be published).

[20] Flexible Scheduling and Compensatory Time Poll," conducted by Penn + Schoen Associates, Inc. for the Employment Policy Foundation, October 27, 1995.

allow for more flexible work schedules.[21] It is not surprising that the private sector is demanding a change. In a 1985 survey of Federal employees participating with flexible work schedules, 72 percent said that they had more flexibility to spend time with their families, and 74 percent said that having a flexible schedule had improved their morale.

Over the past several years, the committee has heard compelling testimony of individuals who are impacted by the FLSA and who believe that the time has come for Congress to change the law to better accommodate today's work force. Ms. Phyllis Diosey, a senior air quality specialist at Malcolm Pirnie in Westchester, NY, summed up the reason that hourly workers are demanding a change:

> Flexibility on the part of employers and employees is critical in today's workplace. Any policy or regulation that hinders this flexibility puts working parents, and I really think especially working mothers, at risk because their role as traditional caretakers will make them less attractive and appear less productive as employees.
>
> I hope that the changes that are made will truly reflect work styles and lifestyles as they exist today and as we enter the 21st century.[22]

1. Compensatory time

The committee is confident that giving hourly employees the ability to choose compensatory time instead of overtime pay for hours worked beyond 40 in a week will be extremely beneficial. Many employees who are covered by the overtime protections of the FLSA expressed their support for changing the law so as to allow employees to choose compensatory time in lieu of overtime pay. Ms. Christine Korzendorfer, an hourly employee at TRW who must balance the substantial overtime hours required by her job with caring for her two children, explained to the Labor and Human Resources Subcommittee on Employment and Training why having the ability to choose between compensatory time and overtime wages would be helpful:

> [Overtime] pay is important to me. However, the time with my family is more important. If I had a choice there are times when I would prefer to take comp time in lieu of overtime. What makes this idea appealing is that I would be able to choose which option best suits my situation.
>
> Just recently, my son was ill and I had to stay at home with him. I took a day of vacation which I would have preferred to use for vacation. I did not want to take unpaid leave * * * If I had had the choice, I would have used comp time in lieu of overtime for that day off from work.

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[21] Princeton Survey Research Associates, "Worker Representation and Participation Survey, Top-Line Results," October, 1994.

[22] Fair Labor Standards Act Oversight Hearing, Before the Senate Committee on Labor and Human Resources, 104th Cong., 2nd Sess. S. Doc. No. 104–39, p. 11.

> Besides, I would have only had to use about five and one-half hours of comp time to cover that 8 hour day.[23]

Ms. Sandie Moneypenny, a process technician at the Timken Co.'s Asheboro, NC bearing plant and an hourly nonexempt employee, explained why having the option of selecting compensatory time would help her to meet the demands of parenthood:

> Today, I can only use comp time in the week it occurs, but as most of you know, life doesn't seem to always work that way. If I could "bank" my overtime, I wouldn't have to worry about missing work if my child gets sick on a Monday or Tuesday. I also would only be postponing valuable time off with my family when I have a busy workweek, because I could always take time off at a later date. We also have several people in our plant that are trying to further their education. They would work overtime during breaks in their school schedule, and use their "banked" overtime during the course of the school year, or during exam week.[24]

There is ample support for concluding that today's work force would like the option of selecting compensatory time off rather than cash wages, for the overtime hours that they work. In its 1995 survey, Penn + Schoen Associates, Inc. found that 75 percent of those surveyed favored a proposal to give workers the opportunity to choose time off in lieu of overtime wages. In fact, 57 percent of those responding speculated that they would choose paid time off more frequently than overtime wages.[25]

Unfortunately, while the FLSA was intended to protect employees, many are finding it too restrictive. Nonexempt employees simply wish for the FLSA to be amended so that they may enjoy the flexibility legally available to their exempt co-workers and government workers. During the 104th Congress, the committee heard testimony from Ms. Arlyce Robinson, an administrative support coordinator for Computer Services Corp., who explained that she spent 20 years of her career in the public sector and that she misses the flexibility associated with compensatory time. Ms. Robinson observed that:

> While the laws was intended to protect us—and maybe 58 years ago it did—and in some cases, is still protecting many, many people, but in today's world it has had the effect of hurting many of the people that it was originally designed to help * * * Again, when we talk about the act, we do not want it replaced; we just want it made a little more flexible.[26]

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[23] Hearing on S. 4, the Family Friendly Workplace Act before the Senate Committee on Labor and Human Resources, Subcommittee on Employment and Training, 105th Cong., 1st Sess, February 4, 1997 (to be published).

[24] Hearing on S. 4, the Family Friendly Workplace Act before the Senate Committee on Labor and Human Resources, Subcommittee on Employment and Training, 105th Cong., 1st Sess, February 13, 1997 (to be published).

[25] "Flexible Scheduling and Compensatory Time Poll," conducted by Penn + Schoen Associates, Inc. for the Employment Policy Foundation, October 27, 1995.

[26] Fair Labor Standards Act Oversight Hearing before the Senate Committee on Labor and Human Resources, 104th Cong., 2nd Sess. S. Doc. No. 104–397, p.39.

2. Bi-weekly schedules

The witnesses also confirmed that it is extremely difficult for employers to institute flexible schedules for hourly employees without violating the FLSA. This is not the case in the public sector, where many workers have the ability to choose to work a "9/80" schedule which involves 80 hours over a 9 day period, such as working 45 hours the first week followed by 35 hours the next week, with a scheduled day off every other week. It is impracticable for hourly employees in the private sector to take advantage of bi-weekly scheduling options. Sallie Larsen, vice president, Human Resources and Communications, TRW Systems Integration Group, testified about TRW employees' frustration with the rigidity of the current law:

> In our business unit, we have a compelling business need to better understand our employee work patterns for bidding new work. In meeting the needs of these employees, we saw an opportunity to add even more flexibility for all of our salaried employees and managers in scheduling work across a longer period of time * * * The professional work schedule helps our salaried employees with two week flexing, partial day time off, and additional time off. However, we are unable to extend this schedule to our hourly employees because of the restrictions of the Fair Labor Standards Act. These employees are amazed to learn that it is a 60-year old law that is substantially unchanged since it was passed that stands in their way of becoming a full member of the team. Their most common complaint: "Why am I treated as a second class citizen?" Our answer: it is the law, not the company's unwillingness to offer the Professional Work Schedule to them.[27]

Employers and employees ought to be free to "flex" the 40-hour workweek when it is advantageous to both parties. Under the current law, however, private sector employers may offer the flextime option of bi-weekly scheduling only to exempt, salaried employees. This creates unnecessary tension between exempt and nonexempt employees. By confining employee's flexibility to the 40-hour workweek, the FLSA is making it more difficult for hourly employees to meet family, community, and personal needs.

3. Flexible credit hours

It is not uncommon in the case of foreseeable future events, such as having a baby, assisting an elderly parent or studying for an exam, for an employee to exhaust his or her paid leave. Although employees may wish to work additional hours in order to "bank" that time for a future event, the FLSA strictly prohibits any type of flexible credit hour program. Jim Willms, executive vice president of Unicover Corp., of Cheyenne, WY, testified before the Labor and Human Resources Subcommittee on Employment and Training about an ill-fated flexible credit hour program that was initiated and designed by Unicover employees:

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[27] Hearing on S. 4, The Family Friendly Workplace Act before the Senate Committee on Labor and Human Resources, Subcommittee on Employment and Training, 105th Cong., 1st Sess, February 4, 1997 (to be published).

> In 1980 our elected Employee Council representing all departments of the Company asked that we adopt an optional compensatory time policy. They wanted a policy that would permit an employee *at his or her sole option* to build up extra hours one-for-one instead of overtime pay which could be used at a later time for additional days off. Our employees told us this would be advantageous to them and to the Company. They said they were really more interested in having more time off to spend with family and enjoying leisure than they were being paid at overtime rates for working more than 40 hours in a week. * * * At the end of 1981, we were advised by the U.S. Department of Labor that our new policy, which had been implemented at the request of, and which had the input of all of our employees, did not comply with the overtime provisions of the Fair Labor Standards Act. We rescinded the policy and paid out all the compensatory time on the books at overtime rates. We faced genuine outrage on the part of our employees that something which they asked for and received from the Company was rescinded because of a 40 year-old Federal law.[28]

Allowing employees to "bank" hours would also provide the millions of Americans who do not work overtime hours with more flexibility because it would give them the ability to work additional hours so that they could use the flexible credit hours as paid time off when necessary. Under the FLSA, however, if an hourly employee sought to work additional hours, that employee would be unable to "bank" those hours. Rather, the employer would have to compensate the employee at an overtime rate for the additional hours. If an employer has no real need for overtime, it is less likely that employers will be willing to pay employees an overtime premium. In essence, there is a disincentive under the FLSA for employers to provide employees with the flexibility that they demand.

4. Salary basis test

There is also a need to clarify the FLSA's salary basis test. Under the salary basis test, an employee is considered to be paid on a salary basis and thus exempt from the FLSA, if that employee regularly receives each pay period a predetermined amount constituting all or part of his or her compensation. This account cannot be subject to reduction for absences of less than a day. However, a number of court cases have interpreted this language to mean that the theoretical possibility of a salary being docked for an absence of less than a day is enough to destroy an employee's exemption, even if there has never been a deduction. William J. Kilberg testified on behalf of the Fair Labor Standards Act Reform Coalition and explained the confusion in this area:

> Most courts, in fact, have applied the "subject to" principle as an ironclad rule, which unequivocally mandates a loss of exemption if anyone can concoct a theoretical cir-

[28] Hearing on S. 4, The Family Friendly Workplace Act before the Senate Committee on Labor and Human Resources, Subcommittee on Employment and Training, 105th Cong., 1st Sess, February 13, 1997 (to be published).

> cumstance under which existing employer policies could allow improper deductions. Beginning with the Ninth Circuit's 1990 decision in *Abshire* v. *County of Kern,*[29] and mushrooming in a series of subsequent cases such as *Martin* v. *Malcolm Pirnie, Inc.,*[30] courts have demonstrated a willingness to ignore all other facts in the case to deny exemptions on nothing more than this draconian "subject to" theory.
>
> The consequences of this misinterpretation are enormous. In *Pirnie,* for example, only a very small handful of partial day deductions had occurred, which the court itself labeled "*de minimis.*" Many of these deductions were entirely understandable; one employee, for example, had voluntarily directed that she did not want to be paid for the portions of workdays she spent working on her doctoral thesis * * * In *Pirnie*, however, the court held that the employer's policy of allowing such deductions caused an entire class of highly paid engineering professionals to lose their FLSA exemption.[31]

The salary basis problem is particularly acute in the public sector. Because of the confusing application of the salary basis test, highly paid executive, administrative and professional employees are bringing actions against their State and local government employers at an alarming rate. The Honorable Paul Jadin, Mayor of Green Bay, Wisconsin, testified on behalf of the U.S. Conference of Mayors and the Public Sector FLSA Coalition about this problem:

> While these [highly paid executive administrative and professional State and local government employees] employees were intended to be exempt from the overtime pay requirements, recent court interpretations of how the salary basis applies to the public sector have led to enormous liability. High level management employees earning between $40,000 and $100,000 annually have been successful in winning back pay for the overtime hours that they have worked. * * * Because the Labor Department has failed to address many of the problems that prevent our employees from qualifying for this exemption, public employers continue to be exposed to enormous liability. This only underscores the need for passing legislation like the amendment included in S. 4 to correct a problem that Congress never intended to be imposed on state and local governments.[32]

In addition, when Congress enacted the Family Medical Leave Act, it recognized that an employee should be able to take unpaid leave for FMLA purposes without the reduction of pay affecting the exempt status of the employee.[33]

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[29] 908 F.2d 483 (9th Cir. 1990), *cert. denied,* 111 S. Ct. 785 (1991).
[30] 949 F.2d. 611 (2d Cir. 1991), *cert. denied,* 113 S. Ct. 298 (1992).
[31] Hearing on S. 4, The Family Friendly Workplace Act before the Senate Committee on Labor and Human Resources, Subcommittee on Employment and Training, 105th Cong., 1st Sess, February 4, 1997 (to be published).
[32] Hearing on S. 4, The Family Friendly Workplace Act before the Senate Committee on Labor and Human Resources, Subcommittee on Employment and Training, 105th Cong., 1st Sess, February 13, 1997 (to be published).
[33] 29 U.S.C. § 2612(c).

5. Time for a change

While the FLSA was enacted to protect workers, many of today's work force view certain of the FLSA's provisions as harmful rather than helpful. Given the overwhelming success of public sector programs, it is important that Congress now extend the same freedom and flexibility to private workers. Flexible work schedules would give employees more control over their lives by giving them a better tool to balance their family and work obligations. Employers and hourly employees must be given the ability to reach accord on flexible schedules beyond the standard 40 hour workweek and to bank compensatory time in lieu of cash overtime where such an arrangement is mutually beneficial. Salary basis reform for non-exempt employees would also increase flexibility options. The FLSA should be amended to assist workers in balancing the needs of an evolving work environment and quality family time.

III. Legislative History and Committee Action

On January 21, 1997, Senator Ashcroft along with Senators Hutchison, Lott, Nickles, Craig, Collins, DeWine, Allard, Brownback, Chafee, Coats, Domenici, Enzi, Faircloth, Gramm, Grams, Grassley, Hagel, Hatch, Helms, Hutchinson, Kyl, Murkowski, Roberts, Sessions, Thurmond, Warner, Coverdell, and Jeffords, introduced S. 4, the Family Friendly Workplace Act. S. 4 is also sponsored by Senators Mack, Smith of New Hampshire, McCain, Cochran, Burns, McConnell and Thomas.

On February 4, 1997, the Labor Human Resources Subcommittee on Employment and Training held a hearing (S. Hrg. 105–__) on the Family Friendly Workplace Act. The following individuals provided testimony:

The Honorable Kay Bailey Hutchison, U.S. Senator

Sandra Boyd of the Labor Policy Association, Inc., Washington, DC

Michael Losey of the Society for Human Resource Management, Alexandria, VA

Sallie Larsen of TRW Systems Integration Group, Fairfax, VA

Christine Korzendorfer of TRW Systems Integration Group, Fairfax, VA

Mark Wilson of Heritage Foundation, Washington, DC

William Kilberg of the Fair Labor Standards Act Reform Coalition, Washington, DC

Karen Nussbaum, Director of AFL–CIO Working Women's Department, Washington, DC

Edith Rasell, The Economic Policy Institute, Washington, DC

Additional statements and letters regarding S. 4 were also received and placed in the record.

On February 13, 1997, the Labor and Human Resources Subcommittee on Employment and Training held a hearing (S. H.G. 105–__) on the Family Friendly Workplace Act. The following individuals provided testimony:

The Honorable John Ashcroft, U.S. Senator

The Honorable Paul F. Jadin, Mayor, Green Bay, WI

Marilyn Richter, Assistant Corporation Counsel, City of New York, NY

Jim Wilms of Unicover Corporation, Cheyenne, WY

Donna Lenhoff, General Counsel, Women's Legal Defense Fund, Washington, DC

Sandy Moneypenny of the Timken Co., Randleman, NC

Kathleen Fairall of the Timken Co., Randleman, NC

Diana Thompson, Pullyup, Washington, DC

William Stone of Louisville Plate Glass Co., Louisville, KY

Susan Eckerly of the National Federation of Independent Business, Washington, DC

David Silberman of Bredhoff & Kaiser, Washington, DC

Additional statements and letters regarding S. 4 were also received and placed in the record.

On March 13, 1997, the Senate Committee on Labor and Human Resources met in executive session to consider S. 4. A quorum being present, the committee voted on the following amendments:

Senator DeWine offered an amendment to improve provisions relating to compensatory time, biweekly work programs, flexible credit hour programs and exemptions. The amendment was accepted.

YEAS	NAYS
Jeffords	Kennedy
Coats	Dodd
Gregg	Harkin
Frist	Mikulski
DeWine	Bingaman
Enzi	Wellstone
Hutchinson	Murray
Collins	Reed
Warner	
McConnell	

Senator Wellstone offered an amendment that would permit the use of compensatory time for family and medical leave and that would further permit employees to use compensatory time for any reason so long as the employee provided two weeks notice and the leave would not cause "substantial and grievous injury" to the employers operations. The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

On March 18, 1997, the Senate Committee on Labor and Human Resources met in executive session to consider S. 4. A quorum being present, the committee voted on the following amendments:

Senator Murray offered an amendment mandating that an employer provide 24 hours per year of unpaid leave for parental involvement in school activities. The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

Senator Dodd offered an amendment to expand the Family Medical Leave Act to cover employers with 25 or more employees. The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

Senator Wellstone offered an amendment to exclude part-time, seasonal, and temporary employees and to exempt employers in the garment business. The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

Senator Wellstone offered an amendment to delay the effective date of the act until such time as the Department of Labor had resolved 90 percent of the wage and hour complaints. The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine

Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

Senator Wellstone offered an amendment to require employers to treat compensatory time off as hours worked for the purpose of calculating overtime and employee benefits. The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

Senator Kennedy offered an amendment to prohibit discrimination against employees who are eligible for compensatory time off and to expand the remedies available for violation of the compensatory time off requirements. The amendment was defeated.

YEAS	NAYS
Kennedy	Jeffords
Dodd	Coats
Harkin	Gregg
Mikulski	Frist
Bingaman	DeWine
Wellstone	Enzi
Murray	Hutchinson
Reed	Collins
	Warner
	McConnell

The committee then voted to report S. 4 favorably.

YEAS	NAYS
Jeffords	Kennedy
Coats	Dodd
Gregg	Harkin
Frist	Mikulski
DeWine	Bingaman
Enzi	Wellstone
Hutchinson	Murray
Collins	Reed
Warner	
McConnell	

IV. Explanation of Bill and Committee Views

S. 4, The Family Friendly Workplace Act, provides private sector employers and employees with the same optional workplace flexibility benefits that public sector employees have enjoyed since

1978. They include earning compensatory time in lieu of traditional monetary overtime pay; and participating in biweekly work schedules and flexible credit hour programs. These options will allow employees to balance the heavy demands of the workplace with their growing obligations to family and education. Participation in these programs are entirely voluntary. This legislation does not mandate that employers offer these programs and employees are under no obligation to participate in them.

A. COMPENSATORY TIME AS AN ALTERNATIVE TO TRADITIONAL OVERTIME COMPENSATION.

1. The compensatory time option is 100 percent voluntary

The cornerstone of the Family Friendly Workplace Act is that the various workplace flexibility options are completely voluntary. While the legislation gives employers the ability to provide compensatory time,[34] the actual decision to choose compensatory time off in lieu of monetary compensation is up to the employee. The decision may not be a condition of employment.

> [N]o employee may be required under this subsection to receive compensatory time off in lieu of monetary overtime compensation. The acceptance of compensatory time off in lieu of monetary overtime compensation may not be a condition of employment.[35]

Opponents of the legislation incorrectly claim that the bill allows employers to avoid providing overtime pay by forcing employees to accept compensatory time off instead. These claims are spurious. The bill takes careful and marked steps to ensure that it is the employee's decision to elect compensatory time off instead of overtime pay. Coercion, intimidation, and threats are expressly prohibited. No employer can force an employee to accept or deny compensatory time nor can an employer force an employee to use accrued compensatory time. Any attempt to do so is punishable by pecuniary measures including liquidated damages to the affected employee.[36]

2. The legislation facilitates a workable compensatory time policy while protecting employees' rights to remuneration for their overtime services

The nature of an employee's agreement to accept compensatory time in lieu of traditional monetary overtime compensation is dictated by whether the employee is represented by a union or not. Employees who are represented by a union will agree or disagree to a compensatory time option through the collective bargaining process.

If nonunion employees choose to accept compensatory overtime in lieu of traditional overtime compensation, they must make that election before they actually perform the overtime work. The agreement may not be considered a condition of employment and must be "entered into knowingly and voluntarily."[37] The decision to elect compensatory time is generally made each workweek. This under-

[34] S. 4 § 3(a)(1)–(r)(3).
[35] S. 4 § 3(a)(1)–(r)(1).
[36] For a complete explanation of penalties please see "Remedies and Sanctions."
[37] S. 4 § (a)(1)–(r)(3)(A)(ii).

scores the idea that any overtime compensation in the form of compensatory time is not a condition of employment, but rather a renewable benefit whose election rests solely with the employee. Furthermore, a nonunion employee's agreement must be written "or otherwise verifiable" and kept pursuant to the record keeping terms of the FLSA.[38]

Contrary to the claim's of the bill's detractors, the "otherwise verifiable" language will not allow employers to coerce, intimidate, or threaten an employee based on any lack of recorded consent. The term "otherwise verifiable" simply allows employees to provide consent in forms other than writing, for example, video recording, tape recording or electronic mail transmissions. This is consistent with FLSA regulations which state that there is no prescribed form of record.[39]

The legislation permits an employee to accrue up to 240 hours of compensatory time during a calendar year or other 12-month period established by the employer. Employees may not carry over accrued compensatory time from one year to the next. Therefore, the legislation mandates that employees are paid monetary compensation at the end of the calendar year or 12-month period, which helps guarantee that employees receive compensation for their overtime work in a timely manner. To ensure that the employee is adequately compensated, the employer must pay the employee no less than the employee's overtime rate at the time the compensatory overtime was earned or the employee's final pay rate, whichever is greater.[40] In addition, the employer must provide the employee with 30 days written notice of its intention to issue monetary compensation for all accrued compensatory time off in excess of 80 hours.[41]

While opponents of the legislation fear that employers will control when an employee will be able to use accrued compensatory time off, their concern is unfounded. The bill clearly states that an employee must be allowed to use his or her accrued compensatory time off within a "reasonable period" of time provided that the time off will not "unduly disrupt" the workplace. This portion of the bill mirrors what is already firmly established, strongly recognized, and upheld in the FLSA and relevant regulations as they pertain to the public sector. The law states:

> An employee of a public agency which is a State, political subdivision of a State, or an inter-state governmental agency who has accrued compensatory time off * * * and who has requested the use of such compensatory time, shall be permitted * * * to use such time within a reasonable period after making the request if the use of the com-

[38] Every employer subject to any provision of this chapter * * * shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or the orders thereunder." 29 U.S.C. § 211(c).

[39] 20 C.F.R. § 516.1.

[40] An employee's final rate of pay is not necessarily the rate of pay at the time of termination or resignation. It may also be an employee's current rate of pay subsequent to a raise.

[41] An employer may want to make an early remittance of accrued compensatory time because the end of the calendar year or 12 month period is approaching and the employer wants to avoid a large payout to several employees who have accrued hundreds of hours.

> pensatory time does not unduly disrupt the operations of the public agency.[42]

The current regulations resolve any remaining issues of ambiguity surrounding an employee's ability to take accrued compensatory time. First, they delineate factors to determine what is a reasonable period of time within which an employer must honor an employee's request to use compensatory time. The factors will vary based on the employer's "customary work practices"[43] and include but are not limited to: "the normal schedule of work, anticipated peak workloads based on past experience, emergency requirements for staff and services, and the availability of qualified substitute staff."[44] In addition, in the union setting, the issue of reasonableness would be resolved in the collective bargaining process.

Second, the regulations define "unduly disrupt" by stating:

> Mere inconvenience to the employer is an insufficient basis for the denial of a request * * * For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that the [time off] would impose an unreasonable burden on the agency's ability to provide acceptable quality and quantity for the public during the time requested without the use of the employee's services.[45]

In interpreting the "unduly disrupt" standard, the courts have repeatedly held that it is a narrow test and that a mere inconvenience to the employer is not enough for an employer to deny an employee the use of compensatory time. For example, one court held that, "[Compensatory time] essentially is the property of the employee"[46] and the "unduly disrupt" standard was not enough to allow an employer to dictate how an employee used his property. Indeed, another court even found that an employer's practice of forcing employees to use their accrued compensatory time to reduce the employer's compensatory time balances was illegal.[47]

Additionally, this portion of the bill is strikingly similar to the provisions of the Family Medical Leave Act and the relevant regulations. That law provides that an employee requiring medical leave based on planned medical treatment, "shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer."[48] The regulations contain veritably the same language.[49]

Reinforcing the employees' ability to control how they are compensated for overtime, the legislation gives nonunion employees the ability to withdraw from a compensatory time program at any time by submitting a written notice to their employer. An employer has 30 days from its receipt of such a request to remit the monetary compensation. The employer's remittance will not be less than the greater of the employee's overtime rate at the time the compen-

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[42] 29 U.S.C. § 207(o)(5)(A)–(B).
[43] 29 C.F.R. § 553.25 (c)(1).
[44] *Ibid.*
[45] 29 C.F.R. § 553.25(d).
[46] *Heaton* v. *Missouri Department of Corrections,* 43 F.3d 1176, 1180 (8th Cir. 1994).
[47] *Moreau* v. *Harris County,* No. 94–1427 (D. S. Texas Nov. 25, 1996).
[48] 29 U.S.C. § 2612(e)(2)(A).
[49] 29 C.F.R. § 825.302(e).

satory time was earned or the employee's final pay rate.[50] An employee's termination or resignation has the same effect as a withdrawal. If an employer wishes to discontinue offering the compensatory time option, it may do so upon giving 30 days written notice to all participating employees.

The bill treats unused or owned compensatory time as unpaid monetary compensation. Specifically, it provides that, "the terms 'monetary overtime compensation' and 'compensatory time off' shall have the meaning given the terms 'overtime compensation' and 'compensatory time', respectively, by subsection (o)(7)."[51] This provision has the effect of guaranteeing that unused compensatory time will be given the same priority that unpaid wages would be given in a bankruptcy proceeding. Thus, unused or owed compensatory time will be categorized as a third priority asset for the purposes of bankruptcy proceedings.

Overtime hours compensated with compensatory time off are no different than overtime hours compensated with traditional monetary overtime pay. Overtime hours compensated with compensatory time off are still hours "for which the employee is paid or entitled to pay for the performance of duties for the employer." They are therefore "hours of service" according to the Employee Retirement Income Security Act.[52] Accordingly, the bill's detractors, who insist that payment in compensatory time rather than money will reduce the number of hours and employee works and consequently the employee's pension benefits, are mistaken. It is the intention of the committee that any hours an employee works overtime, whether they are compensated by monetary overtime pay or compensatory time off, are to be credited for the purpose of accrual, participation, and vesting benefits.

Obviously, an employee who takes advantage of the compensatory time option as opposed to collecting monetary compensation for overtime will realize a reduction in monetary income. A reduction in monetary income will naturally reduce an employee's credits for benefits. This is no different, however, than any other decision an employee makes to lessen the number of actual hours worked; for example, refusing to work offered optional overtime hours or taking leave without pay. There is no detriment to the employee who knowingly and voluntarily makes such a decision. There is, however, an inherent advantage in accruing additional paid time off because it enables an employee to do other things with that time.

Opponents' concerns that compensation in the form of compensatory time will affect an employee's opportunity for unemployment benefits is unfounded. Compensation as compensatory time is no different than compensation as monetary overtime pay. They are even awarded on the same scale. This committee intends to treat compensatory time paid to an employee for overtime hours worked as wages. It does not matter whether an employee accrues the com-

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[50] *See* note 40.
[51] S. 4 § (a)(1)–(r)(10).
[52] 29 C.F.R. § 2530.200b–2.

pensatory time, uses the compensatory time, or cashes out the compensatory time.[53]

3. Severe penalties have been included

Between the prohibitions and penalties already provided for in the FLSA and S. 4's additional measures, employees will be protected from potential employer misconduct.

The FLSA currently makes it unlawful to violate the existing provisions of section 7.[54] Because the legislation will become a part of section 7, it will enjoy the same protection. The FLSA also makes it is unlawful to "discharge or in any other manner discriminate against an employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to "the employee's rights." [55] The FLSA authorizes an employee to file suit in either Federal or State court for a violation of section 7. In addition, an employee may file a complaint with the Department of Labor. The Department of Labor, in turn, may sue the employer for damages or injunctive relief on behalf of the complaining employee.[56] The Secretary of Labor also may seek civil penalties up to $1,000 for willful and repeated violations of section 7.[57] In an action for wrongfully denied overtime compensation, an employee may be entitled to damages equal to the amount of unpaid compensation and another equal amount as liquidated damages.[58] (Liquidated damages may be reduced if an employer has acted in good faith.[59]) Finally, where an employee brings suit, he or she may be entitled to recover his costs and attorney's fees.[60]

The legislation adds a provision making it unlawful to "directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any employee" to request or not request compensatory time off in lieu of monetary overtime pay or to use accrued compensatory time off.[61] The terms "intimidate, threaten, or coerce" are defined as including a "promise to confer or conferring any benefit (such as an appointment, promotion, or compensation) or effecting or threatening to effect any reprisal (such as deprivation of appointment, promotion, or compensation).[62] Thus, for example, an employer may not force an employee to accept compensatory time off rather than monetary overtime pay by promising to promote the employee nor may an employer punish failure to accept compensatory time by failing to promote that employee.

The legislation also adds additional remedies to section 16 of the FLSA. It provides for penalties for violations of its anti-coercion language. An employer who violates S. 4's anti-coercion provision shall be liable to the affected employee for an amount equal to the total of the employee's rate of compensation multiplied by "number

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[53] In some states, payment of accrued compensatory time to a terminated employee will become "disqualifying income." This, however, only will defer the payment of unemployment benefits. It will not affect the amount to which the employee is entitled.
[54] 29 U.S.C. § 215(a)(2).
[55] 29 U.S.C. § 215(a)(3).
[56] 29 U.S.C. § 217.
[57] 29 U.S.C. § 216(e).
[58] 29 U.S.C. § 216(b).
[59] 29 U.S.C. § 260.
[60] 29 U.S.C. § 216(b).
[61] S.4 § 3(a)(1)–(r)(6)(A).
[62] *Ibid.*

of hours of compensatory time off involved in the violation that was initially used by the employee; less the number of such hours accrued by the employee."[63] Furthermore, the affected employee will be entitled to liquidated damages equivalent to the employee's rate of compensation multiplied by "the number of hours of compensatory time off involved in the violation that was initially accrued by the employee."[64] In addition, other remedies are also available including criminal penalties and any additional civil penalties.[65]

B. FLEXIBILITY FOR TODAY'S WORK FORCE

The reality of today's work force is that only 20 percent of hourly workers reportedly work more than 40 hours in a typical week.[66] Of those workers, nearly 3 out of 4 are men, primarily married men.[67] Due to the social changes that have occurred over the past five decades, more women are entering the work force. While these individuals would like greater flexibility in their work schedules, compensatory time will be of little assistance because many workers do not work overtime. Given the demands of today, all workers need more flexibility, not just those who work overtime. It is for this reason that the committee included the biweekly work schedule and flexible credit hour programs in the Family Friendly Workplace Act.

1. Biweekly work schedules

Biweekly work schedule programs will allow employers and employees to decide, either through collective bargaining or agreement at the outset of each biweekly work period, how an employee will schedule an 80 hour work period. Employers and employees are free to agree to any arrangement so long as the total number of hours worked over the 2-week period does not exceed 80. All hours which an employer requires an employee to work that are in excess of the biweekly schedule, are considered overtime and the employee must be compensated accordingly, either by monetary overtime pay or compensatory time off.

Just as the election of compensatory time is voluntary so, too, is the election of biweekly work schedules. Employers do not have to offer biweekly schedules and employees are under no obligation to participate in them. In addition, an employee's participation in a biweekly work schedule may not be a condition of employment.

Under S. 4's biweekly work schedule provisions, employees enjoy the preexisting safeguards of the FLSA. Employees will also benefit from S. 4's own provisions prohibiting an employer from "directly or indirectly intimidat[ing], threaten[ing], or coerc[ing]" an employee to participate a biweekly schedule program. Naturally, the FLSA's preexisting remedies and sanctions as well as S. 4's remedies and sanctions apply to any violation involving a biweekly work schedule program.

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[63] S. 4 § 3(a)(2).
[64] *Ibid.*
[65] *Ibid.*
[66] Anita U. Hattiangadi, *Patterns of Overtime Work: The Case for Greater Workplace Flexibility,* Employment Policy Foundation, 1997, at 7.
[67] *Ibid.,* Employment Policy Foundation tabulations, Current Population Survey data, 1996.

Federal employees have enjoyed the benefit of biweekly work schedules since 1978. Because of the success of biweekly scheduling programs in the public sector, the committee believes that this opportunity should be available to private sector employees as well. Amending the FLSA so as to allow for biweekly work schedules will provide greater scheduling flexibility to more employers and employees.

For union employees, the particulars of a biweekly work schedule, such as hours to be worked and methods of withdrawal, will be set forth in a collective bargaining agreement. In the non-union setting, the agreement between an employee and employer, wherein the employee elects to participate in the program, will be individualized. The employee must enter into an agreement for a biweekly schedule prior to the biweekly period and the agreement must set forth the actual schedule of hours that the employee shall work during that period. As with the compensatory time agreement, the employee must enter into the biweekly schedule agreement knowingly and voluntarily, and the agreement must be evidenced by a written affirmation or otherwise verifiable[68] assertion on the part of the participating employee. Under no circumstances is it to be a condition of employment. All such agreements must be preserved according to the requirements of the FLSA's recording keeping provision.[69]

Because biweekly work schedule programs are voluntary, non-union employees may withdraw their agreement to participate by providing written notice to the employer. Similarly, an employer may discontinue a biweekly work schedule program upon thirty days notice to all participating employees.

An example of a biweekly work schedule is:

> (1) During week one, an employee works 5 days from 8:30 a.m. to 6 p.m. with a half hour for lunch each day. The total amount of hours worked during week one therefore equals 45. No overtime is paid for time worked beyond 40 hours during week one. (2) During week two, an employee works Monday from 8:30 a.m. to 5 p.m. and Tuesday through Thursday from 8:30 a.m. to 6 p.m. Each day during week two allows a half hour for lunch. The employee is able to take Friday of week two off. The total number of hours worked during week two equals 35. The total number of hours worked during the two week period equals 80.

Any hours that an employer requests the employee to work beyond the predeteremined 80 scheduled hours are considered overtime and the employee must be compensated for this overtime accordingly. In the example above, working until 6 p.m. on the second Monday would result in an hour of overtime even if the hour were eliminated from the Tuesday through Thursday schedule.

The biweekly schedule provides the employer with 80 hours of an employee's labor or expertise over a 2-week period. While this is

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[68] The term "otherwise verifiable" simply allows employees to provide consent in forms other than writing, for example, video recording, tape recording, electronic mail transmissions, or verbal consent that falls within an accepted exception to the hearsay rule. The regulations pertaining to the FLSA state that there is no prescribed form of record. 29 C.F.R. § 516.1.

[69] 29 U.S.C. § 211(c).

presumably the same number of hours the employee would have worked, the flexibility and the additional day off gives employees the ability to tailor their schedules to meet their needs and is likely to engender a more contented, healthier, more balanced, and more productive employee; an asset to any employer. The biweekly schedule provides employees with the flexibility they desire and allows them to spend more time with family, pursuing leisure activities, or continuing education.

2. Flexible credit hour program

Like biweekly schedules, flexible credit hours provide flexibility to employees who may not traditionally work a great deal of overtime. A flexible credit hour program will give more employees a greater ability to balance work with family. The bill's language that provides for and governs this option is quite similar to the compensatory time provision.

A flexible credit hour program would allow an employee to request to work up to 50 hours over his or her regularly scheduled hours. Flexible credit hours are awarded on a one to one ratio: one credit hour for one hour over an employee's regular schedule. Each hour is a "flexible credit hour" which is then "banked" for future use. The employee may use those banked hours at any future date to reduce a workday or a workweek. When used, flexible credit hours represent time off from work at the employee's regular rate of pay.

As with compensatory time and biweekly programs, an employer has the initial decision of whether to offer the flexible credit hour program. Participation in a flexible credit hour program is, of course, voluntary. An interested employee must elect to participate. The legislation provides that:

> [A]t the election of the employee, the employer and the employee jointly designate hours for the employee to work that are in excess of the basic work requirement of the employee so that the employee can accrue flexible credit hours to reduce the hours worked in a week or day subsequent to the day on which the flexible credit hours are worked.[70]

The legislation defines election as "at the initiative of, and at the request of the employee"[71] thereby reinforcing the voluntary nature of the bill. An employee's choice to participate pursuant to this legislation's pervasive policy of employee choice, is made under the same guidelines established for agreements to participate in compensatory time and biweekly work schedule programs. Union employees perform according to their collective bargaining agreements and nonunion employees must submit a written or "otherwise verifiable"[72] statement acknowledging his participation in the program. The anti-coercion, remedy, and sanction provisions applica-

[70] S. 4 §§ 3(b)(1)–13A(c)(1).
[71] S. 4 §§ 3(b)(1)–13A(e)(4).
[72] The term "otherwise verifiable" simply allows employees to provide consent in forms other than writing, for example, video recording, tape recording, electronic mail transmissions, or verbal consent that falls within an accepted exception to the hearsay rule.

ble to compensatory time off options and biweekly work schedule programs apply to the flexible credit programs as well.

Compensation for unused accrued credit hours is handled in much the same way that compensation for unused compensatory time is handled. If, after a calendar year or other 12 month period established by an employer, an employee participating in a flexible credit hour program has not used all his or her credit hours, the employer is required to cash out the employee's remaining credit hours at the employee's normal rate. The employer has until January 31 of the following year or 31 days following the end of the employer's 12 month period to provide this compensation.

An employee must be allowed to use accrued credit hours within a reasonable period of time following the request so long as doing so will not unduly disrupt the workplace. The discussion above of the proper construction of the standard of "unduly disrupt" in the context of unused compensatory time applies equally to the use of flexible credit hours.

A nonunion employee may withdraw at any time by submitting a written notice to his or her employer and requesting monetary compensation for the balance of unused accrued credit hours. Such compensation is paid at a rate equal to the employee's normal rate and an employer has 30 days from receiving the request to remit the monies due. An employer may discontinue a flexible credit hour program by providing 30 days written notice to participating employees that it intends to discontinue the program.

C. CORRECTING CONFUSION OVER THE "SALARY BASIS" TEST

The final portion of this legislation helps clarify an ambiguity that has arisen under the "salary basis" test. Recent judicial interpretations of the "subject to" language contained in the FLSA regulations have clouded the salary basis test and caused unnecessary litigation and windfall awards for highly paid employees. This portion of the legislation is merely intended to clarify who is and who is not an exempt employee and avoid any further inequitable payments of overtime back-pay.

For more than five decades, the "subject to" language generated little or no controversy. In recent years, however, courts began to reinterpret the salary basis standard. Seizing upon the "subject to" language, large groups of employees have won multimillion dollar judgments. These awards have been awarded in spite of the fact that many of the plaintiff-employees have never actually experienced a pay deduction of any kind and have never expected to receive overtime pay in addition to their "executive, administrative, or professional" salaries.

The committee wishes to clarify that an employee will not lose their exempt status because his or her employer has a policy on the books that provides for a reduction in pay for absences of less than a full day or less than a full pay period. However, the legislation would not affect the outcome as to a particular employee if that employee experienced an actual reduction in the compensation. Therefore, an employee whose salary was reduced could still lose his or her exempt status.

In a recent case, *Auer* v. *Robbins,*[73] the U.S. Supreme Court attempted to clarify the "subject to" language. However, the Court's decision did not go far enough so as to eliminate the notion that employees could lose their exemption status based solely on the fact that their employer had a personnel policy on the books. Therefore, it is up to Congress to define the test once and for all. S. 4 clarifies that being "subject to" a reduction in pay for an employee's absence from work for less than a full day or less than a full pay period (depending on how the employee's pay structure is organized) does not destroy an employee's exempt status.

The committee has included this clarification, in part, to stop the deluge of cases that are being brought against state and local governments. The committee recognizes that the Department of Labor attempted to solve this problem through regulations, as it applies to State and local employees in 1992.[74] This legislation in no way preempts those regulations. Therefore, a reduction in pay of an employee of a public agency for absences of less than a day pursuant to principles of public accountability shall not be considered in making a determination as to employment status. Further, it is the committee's intention that a reduction in pay of an employee of a public agency for absences due to a budget required furlough shall not considered in making a determination as to employment status, except in the workweek in which the furlough occurs.

As an additional clarifying point, S. 4 provides that additions to an exempt employee's salary, such as overtime premiums or an end-of-the-year bonus will not destroy an exemption. Last, S. 4 provides that the salary basis clarification be retroactively applied to all such actions in which final judgment has not been made as of the effective date.

In addition to clarifying the law and avoiding inequitable judgements, this committee intends to foster a more family friendly workplace. If an employer is to be encouraged to foster a family friendly workplace it can not be hindered by the concern that granting bonuses or providing needed unpaid time off to salaried employees may become a crushing liability.

SUMMARY

There are more single parents and dual income families in our work force than ever before and their numbers are growing. In today's society employees are faced with the difficult task of balancing their obligations at work with their obligations to family, school, and other needs. For many years, Federal, State, and local governments have enjoyed the benefit of statutory options creating a flexible work schedule and allowing their employees an opportunity for more leisure time, time with family, or time to continue an education. S. 4, The Family Friendly Workplace Act, will amend the Fair Labor Standards Act to finally provide employers and employees in the private sector with the same benefits public sector employees have enjoyed.

S. 4 provides three options: 1) compensatory time off in lieu of monetary overtime pay, 2) biweekly work schedules, and 3) flexible

[73] No. 95–897; 65 U.S.L.W. 4136 (1997).
[74] 29 C.F.R. § 541.5d.

credit hours. Participation is voluntary; employers do not have to offer these programs and employees do not have to participate in them. Under no circumstances will participation ever be a condition of employment.

Compensatory time

Compensation as compensatory time off is paid out at the same rate as an employee's normal rate of overtime pay, one and a half hours of compensatory time off for every hour of overtime worked. Compensatory time off is treated as any other wage for the purposes of bankruptcy, pension, and unemployment benefits.

Employers and employees must agree to provide and receive respectively, compensatory time in lieu of monetary overtime pay. Union employees do so through the collective bargaining process. Nonunion employees must do so by agreement prior to the performance of overtime work. The employee must enter this agreement "knowingly and voluntarily." Furthermore, a nonunion employee's decision to participate in a compensatory time off program must be in writing or be "otherwise verifiable" and kept by the employer according to the Fair Labor Standards Act's record keeping provision.

An employer may withdraw from his decision to provide a compensatory time off program by providing 30 days written notice to the participating employees. Similarly, nonunion employees may withdraw by providing written notice to his or her employer. The terms of the union employee's withdrawal will be reflected in the collective bargaining agreement. Upon an employer's discontinuance of a compensatory time off policy or an employee's withdrawal, resignation, or termination, an employee is entitled to the cash equivalent of any unused compensatory hours. The employer's remittance must not be less than the greater of the employee's overtime rate or the employee's final rate of pay.

An employee may accrue up to 240 hours of compensatory time during a 12 month period. If, after the 12 month period, an employee has not used his accrued time, the employer has 31 days to remit the cash equivalent of those hours. If an employee has accrued over 80 hours at any time, an employer may remit the cash equivalent of those excess hours.

An employee must be allowed to use any accrued compensatory time within a "reasonable period" of time of a request to do so provided that it does not "unduly disrupt" the workplace. Under a compensatory time off program, an employee enjoys the preexisting protections of the Fair Labor Standards Act, including prohibitions against violations of section 7 and FLSA's discrimination provision, as well as S. 4's anti-coercion provision. No employee may be coerced, intimidated or threatened to accept or deny participation in any of the bill's flexible workplace options. Violation of any of these provisions submits an employer to pecuniary liability including liquidated damages and any other viable remedy at law or equity.

Biweekly work schedules

Biweekly work schedule programs are simply another alternative to providing a more flexible workplace. Biweekly work schedules enable employees to craft schedules that coordinate their work obligations with their personal obligations.

If an employer chooses to offer a biweekly scheduling option and an employee elects to participate, prior to each 2-week work period the employer and employee will arrange a schedule for the 2-week period. Regardless of how the hours are divided, the employee will not be required to work past 80 hours during the 2-week period. Employees will be entitled to overtime for all hours worked which are outside the predetermined biweekly schedule.

The parameters of the program are practically interchangeable with those facilitating compensatory time off programs. A participating employee enjoys the same protections and may utilize the identical remedies. A biweekly work program provides employers and employees flexibility to address other demands.

Flexible credit hours

Flexible credit hour programs are a third scheduling alternative. An employee may choose to work additional hours (more than 40 hours) in a week in order to "bank" those hours and use them to shorten a work week at a later date. An employee may accrue up to 50 credit hours annually. As with the other options, the employee's participation is completely voluntary.

The program's particulars also trace those of the compensatory time off option and the biweekly work schedule program. Employees remain entitled to the same protections and remedies, agreement, accrual, withdrawal, and notice requirements. The program is similar to both the compensatory time off and the biweekly works schedules because the policy behind it is the same: namely to give workers more flexibility by providing alternatives to the traditional 40 hour work week and existing overtime procedures.

Salary basis employees

Finally, S. 4 clarifies the "subject to" language in the regulations delineating the salary basis test. S. 4 clarifies that the fact that a particular employee is subject to a deduction in pay for absence of less than a full work day or less than a full pay period may not be considered in determining whether that employee enjoys exempt status. Only actual reductions in pay may be considered. The legislation also clarifies that employers may give bonuses and overtime payments to salaried employees without destroying their exemption from the FLSA.

V. COST ESTIMATE

U.S. CONGRESS
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 2, 1997.

Hon. JAMES M. JEFFORDS,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 4, the Family Friendly Workplace Act. If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Christina Hawley Sadoti and Mary Maginniss for federal costs, John Patterson for state and local impacts, and Kathyrn Rarick for private sector impacts.

Sincerely,

JAMES L. BLUM
(For June E. O'Neill, Director.)

S. 4—Family Friendly Workplace Act

Summary: CBO estimates that enactment of S. 4 would result in a small savings to the federal government. S. 4 would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply. The bill would impose no new intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1955 (UMRA), and could result in savings for state, local, and tribal governments.

S. 4 would amend the Fair Labor Standards Act (FLSA) to allow employers to establish more flexible compensation systems, so long as such arrangements are in accordance with a collective bargaining agreement or both the employer and the employee agree. The bill would allow employers to provide compensatory time off in lieu of monetary overtime compensation for private employees, pay overtime to employees who work more than 80 hours in a two-week period (rather than 40 hours in a single week), and provide flexible credit-hour programs whereby hourly credits beyond the basic schedule can be exchanged for time off at a subsequent date. Under current law, private-sector employers may not offer these types of arrangements. Employees of the federal government (excluding most employees of the legislative branch) currently may receive time-and-a-half compensatory time in lieu of time-and-a-half overtime pay, and may have flexible work schedules under conditions similar to those specified in S. 4.

Finally, S. 4 would change the salary test used to determine if an employee is exempt from the FLSA's overtime requirements. Under current law, an employee is defined as an hourly worker and entitled to overtime pay if it is theoretically possible that the employee's pay could reduced for an absence of less than a day or a week. The bill would change the salary test from a theoretical loss of pay to an actual loss of pay, and would allow employers to provide overtime pay and other compensation without making an employee an hourly worker who would be automatically entitled to overtime pay.

Estimated cost to the Federal Government: Enacting S. 4 would save about $1 million annually, assuming that appropriations are reduced accordingly.

Basis of estimate: Enactment of S. 4 would probably have a minor impact on the legislative branch of the federal government. Within the legislative branch, employees who are not exempt from the FLSA may receive compensatory time in lieu of overtime pay under limited conditions governed, for the most part, by regulations that implement the Congressional Accountability Act. If S. 4 were enacted, it is likely that these regulations would be rewritten to reflect more closely the options available to the private sector, thus giving the legislative branch greater flexibility in compensating employees for overtime hours worked. As a consequence, some legislative branch employees would opt for and employers would provide compensatory time instead of overtime pay. CBO estimates that the resulting savings would amount to about $1 million annually, beginning in fiscal year 1998.

Accordingly, S. 4 would require the Secretary of Labor to revise the materials that explain the Fair Labor Standards Act to employees to reflect the changes made by the Family Friendly Workplace Act. These requirements are provided for in current law, and therefore would pose no additional costs to the Department of Labor.

The budgetary impact of this legislation falls within budget subfunction 801 (Legislative Branch).

Pay-as-you-go considerations: None.

Estimated impact on State, local, and tribal governments: S. 4 would impose no new intergovernmental mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA) and could result in savings for state, local, and tribal governments.

The wage provisions of the FLSA apply to tribal governments on a case-by-case basis. Under current law, in the cases where the

FLSA applies (for example, when employees of tribal governments are not members of the tribe), tribal governments cannot provide compensatory time in lieu of overtime pay, deny overtime pay to employees who work more than 40 hours in a week but less than 80 hours in a two-week period, or give hourly credits for work carried out beyond the basic work requirements, which can then be exchanged for additional time off at a later date. The bill could reduce the employment costs of tribal governments by allowing such procedures when the affected employees agree to them. (Because state and local governments would be excluded from these amendments to the FLSA, the amendments would have no impact on them.) At the same time, the bill would increase the cost of another FLSA mandate that requires tribal governments to post a notice explaining the FLSA to their employees. CBO estimates that any additional posting costs would be insignificant.

In addition, S. 4 would change the salary test used to determine whether an employee is exempt from the FLSA's overtime pay requirements. This change could reduce future compensation costs of state, local, and tribal governments and eliminate a number of pending liability claims for a variety of pay practices.

Estimated impact on the private sector: The bill contains no new private-sector mandates as defined in UMRA. By relaxing existing mandates related to the payment of overtime, the bill would reduce employment costs for some employers. At the same time, the bill would increase slightly the cost of an existing mandate on employers that requires them to post a notice explaining the Fair Labor Standards Act to their employees. CBO estimates that any added cost to employers would be well under the $100 million annual threshold specified in UMRA and that the bill would most likely result in net savings for employers.

Previous CBO estimate: On March 6, 1997, the Congressional Budget Office prepared an estimate for H.R. 1, the Working Families Flexibility Act of 1997. H.R. 1 also would allow private employers to offer compensatory time off in lieu of overtime pay, but it would not allow employers to offer bi-weekly work programs or flexible credit hours. The estimated effects of H.R. 1 and S. 4 on the federal budget are identical.

Estimate prepared by: Federal Cost—Christina Hawley Sadoti and Mary Maginniss; impact on State, local, and tribal governments—John Patterson; impact on the private sector—Kathryn Rarick.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

VI. Regulatory Impact Statement

The committee has determined that the bill would result in some additional paperwork, time and costs to the Department of Labor, which would be entrusted with implementation and enforcement of the Act. It is difficult to estimate the volume of additional paperwork necessitated by the Act, but the committee does not believe it will be significant.

VII. Application of Law to Legislative Branch

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act (CAA), requires a description of the application of this bill to the legislative branch. S. 4 amends the Fair Labor Standards Act of 1938 to provide compensatory time, biweekly schedules and flexible credit hours for all employees. S. 4 also amends the Fair Labor Standards Act to clarify that a salaried employee, who has not incurred an actual reduction in pay, shall not lose his or her exempt status due to the fact that the employee is subject to deductions in pay for absences of employment of less than a day or less than a full-pay period. Section 203(a) of the CAA applies the rights and protections of subsections (a)(1) and (d) of section 6, section 7, and section 12(c) of the Fair Labor Standards Act[75] to covered employees and employing offices of the legislative branch. Section 225(f)(1) of the CAA applies to the exemptions of these laws and section 13 of the Fair Labor Standards Act is such an exemption. S. 4 amends section 13 of the Fair Labor Standards Act by adding a new subsection (m). Therefore, the changes made by S. 4 to section 7 and section 13 of the Fair Labor Standards Act[76] apply to the legislative branch.

VIII. Section-by-Section Analysis

Sec. 1. Short Title.—The bill may be referred to as the "Family Friendly Workplace Act."

Sec. 2. Purposes—The legislation will amend the Fair Labor Standards Act to provide employees in the private sector the benefits and advantages of compensatory time, biweekly work schedules, and flexible credit hours that Federal government employees have enjoyed since 1978. Private sector employees will be able to choose, based on their personal situations and requirements, whether to accept compensatory time in place of overtime pay and whether to participate in biweekly work programs and flexible credit hour programs.

Sec. 3(a)(1). Workplace Flexibility Options.—The legislation amends Section 7 of the Fair Labor Standards Act of 1938. The amendment provides an opportunity for employees who work overtime hours to choose compensatory time rather than the traditional time and a half monetary compensation. The compensatory time option does not delete traditional overtime pay, it simply offers an alternative. Furthermore, the legislation allows an employee who no longer wants compensatory time, to exchange the balance of any accrued time for traditional monetary compensation. Specifically, the legislation adds the following provisions to the end of the Fair Labor Standard Act, Section 7:

(r)(1). Voluntary Participation.—The employee's decision to accept compensatory time is entirely voluntary and may not be a condition of employment. Unless a collective bargaining agreement says otherwise, no employee is required to accept compensatory time in lieu of traditional overtime pay. An employer may not intimidate, threaten, or coerce an employee to accept or deny the

[75] 29 U.S.C. §§ 206(a)(1) and (d); 207; 212(c).
[76] 29 U.S.C. § 207.

compensatory time option or to use compensatory time or accrued time off.

When a nonunion employee enters into an agreement or understanding with an employer, the agreement must allow the employee to choose either monetary overtime pay or the accrual of compensatory time in lieu of overtime pay for each workweek overtime is offered.

(r)(2). General Rule.—An employee may elect to receive compensatory time in lieu of monetary overtime compensation. An employee must accrue at least 1.5 hours of compensatory time for every hour of overtime pay to which he or she would otherwise be entitled. Public agencies are expressly excluded from the provisions regarding compensatory time.

(r)(3). Conditions.—Where an employee is represented by a union that has been recognized under § 9(a) of the NLRA, compensatory time may be provided pursuant to a collective bargaining agreement. Where an employee is not represented by a union that has been recognized under § 9(a) of the NLRA, compensatory time may be provided pursuant to an agreement or understanding that an employee has entered into, knowingly and voluntarily, prior to the performance of work but such an agreement may not be a condition of employment. In order to receive compensatory time an employee must provide written or otherwise verifiable consent which the employer must maintain in accordance with section 11(c).

(r)(4). Hour Limit.—An employee may accrue up to 240 hours of compensatory time during a calendar year or other 12 month period designated and communicated by the employer. An employee may not carry over compensatory hours from one 12 month period to the next. If an employee has unused compensatory time by the last day of the 12th month, his or her employer must provide monetary compensation for unused hours by the last day of the 13th month. Any time an employee has accrued more than 80 hours of compensatory time, the employer may provide the employee with 30 days written notice of its intention to issue monetary compensation for all accrued compensatory time in excess of 80 hours.

(r)(5). Discontinuance of Policy or Withdrawal.—An employer may discontinue a compensatory time policy by providing those employees who are accruing compensatory time in lieu of overtime with 30 days written notice. An employee may provide an employer with written notice at any time that he or she is withdrawing the agreement or understanding to receive compensatory time in lieu of overtime pay. An employee may provide an employer with written notice at any time that his or her unused compensatory time be returned as monetary compensation. An employer must remit the monetary compensation within 30 days from the date it receives the written request.

Sec. 3(a)(2). Remedies and Sanctions.—The legislation amends Section 16 of the Fair Labor Standards Act of 1938 to include pecuniary remedies for violations of the prohibition against intimidation, threats, and coercion. Specifically the legislation adds the following to Section 16:

(f)(1) An employer who violates the prohibition is liable for the employee's rate of compensation multiplied by the number of hours of compensatory time involved minus any compensatory hours used

by the employee. Furthermore, the employer is liable for liquidated damages equaling the employee's rate of compensation times the number of compensatory hours initially accrued.

(f)(2). These penalties are not substitutes for any other viable remedies including civil and criminal remedies.

Sec. 3(a)(3). Calculations and Special Rules.—The legislation amends the Fair Labor Standards Act of 1938 by continuing Section 7(r), introduced above. This portion of section 7(r) outlines how and according to what rate an employee is compensated for relinquishing accrued compensatory time. Specifically the legislation offers the following:

(r)(5). Termination of Employment.—Upon termination, an employee who has accrued compensatory time according to a prescribed rate.

(r)(6). Rate of Compensation for Compensatory Time Off.—When an employee relinquishes accrued compensatory time in exchange for traditional pay, the rate will not be less than the greater of the employee's normal overtime rate when the compensatory time was earned or the employee's final pay rate.

(r)(7). Use of Time.—An employee who chooses to use earned compensatory time must be allowed to do so within a reasonable period of time after making a request provided that such use does not unduly disrupt the workplace.

(r)(8). Definitions.—Monetary Overtime Compensation and Compensatory Time Off have the same meanings given to Overtime Compensation and Compensatory Time respectively outlined in subsection (o)(7).

Sec. 3(a)(4). Notice to Employees.—The Secretary of Labor will provide revised materials no later than 30 days following the enactment of this act explaining the revisions and notifying employees of the amendments to the Fair Labor Standards Act of 1938.

Sec. 3(b)(1). Biweekly Work Programs And Flexible Credit Hour Programs.—The legislation amends the Fair Labor Standards Act of 1938 by creating two optional programs for private sector employers and employees. First, biweekly work programs will allow employees to select how many hours they want to work in a given week during a 2 week 80 hour work period. Second, flexible credit hour programs will allow employers and employees to agree what hours and how many hours an employee will work overtime. The overtime hours are "flexible credit hours" that the employee can accrue and use whenever necessary to shorten a typical workday or work week. Specifically, the legislation inserts the following language before Section 13 of the Fair Labor Standards Act of 1938:

SEC. 13A. BIWEEKLY WORK PROGRAMS AND FLEXIBLE CREDIT HOUR PROGRAMS

13A(a)(1). Voluntary Participation.—Neither biweekly programs nor flexible credit hour programs may be conditions of employment. Both are entirely voluntary.

13A(a)(2). Collective Bargaining Agreement.—An employee may only be required to participate in a biweekly work schedule program, a flexible credit hour program, or both in accordance with the terms of the collective bargaining agreement.

13A(b)(1). Biweekly Work Programs.—An employer may establish biweekly work schedules. Under a biweekly work schedule an employee may work up to 80 hours in any combination over a two week period.

13A(b)(2). Conditions.—An employer may only establish a biweekly work program if the program comports with relevant collective bargaining agreements or, in the case on non-union workers, with any relevant agreements or understandings. Employees who wish to participate in a biweekly program must provide written or otherwise verifiable consent of their participation which the employer must retain in accordance with section 11(c).

13A(b)(3). Compensation for Hours in Schedule.—Participating employees must be compensated at a rate that is no less than their regular rate of compensation.

13A(b)(4). Computation of Overtime.—If an employer requests that an employee work hours in excess of the biweekly schedule or in excess 80 hours in the 2 week period, then the excess hours shall be considered overtime hours.

13A(b)(5). Overtime Compensation Provision.—Any employee working overtime hours during a biweekly work schedule shall receive compensation at 1.5 times their normal rate of compensation or compensatory time.

13A(b)(6). Discontinuance of Program.—An employer may discontinue a biweekly work program by providing its participating employees with 30 days written notice. A nonunion employee participating in a biweekly work program may withdraw his/her agreement or understanding to participate in the program at the end of any 2-week period by providing written notice to the employer.

13A(c)(1). Flexible Credit Hour Programs.—An employer may establish flexible credit hour programs. Once an employee elects to participate, the employer and employee agree on the hours to be worked in excess of the normal schedule, designating those additional hours as flexible credit hours.

13A(c)(2). Conditions.—An employer may establish a flexible credit hour program only if the program comports with any relevant collective bargaining agreements or, in the case of non-union workers, with any relevant agreements or understandings. Employees who wish to participate in a flexible credit hour program must provide written or otherwise verifiable consent of their participation which the employer must retain in accordance with section 11(c). Non-union agreements or understandings must state that the employer and employee will jointly designate, for any applicable workweek, the flexible credit hours.

13A(c)(3). Hour Limit.—An employee may accrue up to 50 hours of flexible credit hours during a calendar year. If an employee has not used his or her accrued hours by December 31, his or her employer has until January 31 to provide monetary compensation for the unused hours.

13A(c)(4). Compensation for Flexible Credit Hours.—An employee shall be compensated for flexible credit hours at a rate no less than his or her normal compensation.

13A(c)(5). Computation of Overtime.—If an employer requests that an employee, who has elected to participate in the flexible credit hour program, work hours, which are in excess of 40 hours

in a given week and which have not been previously designated as flexible credit hours, those hours shall be considered overtime hours.

13A(c)(6). Overtime Compensation Provision.—For each overtime hour earned under a flexible credit hour program, an employee will be compensated either 1.5 times his or her normal rate or receive compensatory time.

13A(c)(7). Use of Time.—An employee who chooses to use flexible credit hours must be allowed to do so within a reasonable period of time after making a request provided that such use does not unduly disrupt the workplace.

13A(c)(8). Discontinuance of Program or Withdrawal.—An employer may discontinue an established flexible credit hour program by providing its participating employees with 30 days written notice. An employee may provide an employer with written notice at any time that he or she is withdrawing the agreement or understanding to participate in a flexible credit hour program. An employee may provide an employer with written notice at any time that his/her unused flexible credit hours be returned as monetary compensation. An employer must remit the monetary compensation within 30 days of receiving the employee's request.

13A(d)(1). Prohibition of Coercion.—An employer may not intimidate, threaten, or coerce an employee to: participate in either a biweekly work schedule program or a flexible credit hour program, to work flexible credit hours, or to use accrued flexible credit hours. Furthermore, the term "intimidate, threaten, or coerce" includes a promise to confer a benefit and the threat to effect a reprisal.

13A(e). Definitions.—This section defines key terms used in the bill: Basic Work Requirement, Collective Bargaining, Collective Bargaining Agreement, Election, Employee, Employer, Flexible Credit Hours, Overtime Hours, and Regular Rate.

Sec. 3(b)(2). Prohibitions.—Section 15(a)(3) of the Fair Labor Standards Act of 1938 is amended to include only minor changes.

Sec. 3(c)(1). Limitations On Salary Practices Relating To Exempt Employees.—The legislation amends the Fair Labor Standards Act to include factors used to determine whether an employee has an exempt status. Specifically, the following is added to section 13:

(m)(1). In General.—The fact that a particular employee is subject to a deduction in pay for absence of less than a full work day or less than a full pay period may not be considered in determining whether that employee enjoys exempt status, only actual reductions in pay may be considered. In addition, the fact that an employer compensates an exempt employee with overtime pay or other additional compensation shall not be considered in the determination of that employee's status.

(m)(2). Effective Date.—The effective date of this amendment will be on the date of enactment and will apply to any relevant civil action in which final judgment has not been rendered prior to such date.

IX. ADDITIONAL VIEWS

I am proud to be an original cosponsor of S. 4, the Family-Friendly Workplace Act, which amends the Fair Labor Standards Act of 1938. I am a strong supporter of both employee and employer rights—always have been. Providing employees with flexible work schedules and increasing choices and options for their time at work—and quality time with their families—makes good common sense.

The Fair Labor Standards Act of 1938 has been beneficial. Our society, however, has braved a storm of changes since this act was passed 59 years ago. Our Nation's work environment has changed since 1938 through the introduction of personal computers, high speed modems, cellular phones, pagers and fax machines. American suburbanization has created audio and video conferencing, satellite offices, and most importantly, "telecommuting." There has also been an influx of women into our Nation's workforce since 1938. According to the Bureau of Labor Statistics, 76 percent of mothers with school-age children now work. Moreover, 63 percent of mother and father households now see both parents working outside of the home—one works to pay the bills, while the other works to pay the taxes. Despite such demographic and technological advancements, American employers and employees remain tethered to a 59-year-old Act that forbids them from crossing that "bridge to the 21st century." This is why the Fair Labor Standards Act of 1938 yearns for a modern-day fix.

Some people are now working two jobs to make ends meet—the second at less pay than the first since labor costs are being held down by avoiding overtime. These jobs are generally inflexible and provide the employee with little or no family-time. In addition, a large portion of these jobs are "temp" positions—which, once again, drive down the cost of paying overtime wages. The Family-Friendly Workplace Act provides the time off employees desire, while keeping the option of overtime wages open. It is often the case, however, that people can bank time easier than money. Once they get the money—they spend it. The average worker never sees the money anyway. I can tell you from experience that this generation isn't interested in overtime—they want the time off. The Family-Friendly Workplace Act goes the extra mile by giving them the ability to choose either one.

Federal employees have enjoyed flexible work schedules since 1978—19 years! I have never "bought into" the notion that federal employees should somehow be blessed with greater flexibility in the workplace than private sector employees. I am fully confident that the provisions in S. 4 will not only grant our nation's workforce with choices and options that are family-friendly, but safeguard both employers and employees from the possibility of abuse. We must take action now to help employees balance the de-

mands of work and family lives. I believe that S. 4, the Family Friendly Workplace Act, is an important first step in helping our Nation's working parents do just that.

MICHAEL B. ENZI.

X. MINORITY VIEWS

INTRODUCTION

The majority report goes to great lengths to make the case that employees want more control over their work schedules. In the second sentence, the majority correctly points out: "Today, there are more working, single parents and dual families in America than ever before." The report goes on to note that women now account for 46% of the labor force, and that in 62% of the two parent families with children, both parents are working outside the home. These workers need more opportunity to take time off from their work to be with their children.

We agree wholeheartedly with that description of the needs of today's workforce. In fact, this portion of the report makes a compelling case for expansion of the Family and Medical Leave Act (FMLA). However, when Senator Dodd and Senator Murray offered amendments to expand the number of employees covered by the FMLA and to increase the leave opportunities provided for by the Act, the majority unanimously voted against them. These amendments would have provided workers with a genuine choice to take time off when they needed it the most.

The very employee witnesses whom the majority cites in its report—Christine Korzendorfer and Sandie Moneypenny—emphasized the importance of employee choice in their testimony. Ms. Korzendorfer told the Employment and Training Subcommittee: "What makes this idea appealing is that I would be able to choose which option best suits my situation." But those who brought Ms. Korzendorfer to testify failed to advise her that, under S. 4, it is her employer alone who will determine what scheduling flexibility is available in her workplace.

Similarly, Ms. Moneypenny testified that "if I could 'bank' my overtime, I wouldn't have to worry about missing work if my child gets sick on a Monday or Tuesday." The problem is that S. 4 will not assure her that opportunity. Her employer will have no obligation to let her use the accrued comp time on the days when her child becomes ill.

It is for these reasons that the minority opposes S. 4—it offers only the appearance of employee choice, not the reality. A close reading of the bill reveals the flaws at its heart. Although the minority offered amendments that highlighted these deficiencies, the majority refused to adopt a single one. Smoke and mirrors may be acceptable to the proponents of this bill, but not to the minority on this Committee. We unanimously oppose this legislation, applaud the President's promise to veto it, and urge our colleagues in the Senate to reject it outright.

No real employee choice

There is significant interest in the idea of legislation that would allow an employee to make a truly voluntary choice to be compensated for overtime work in time off rather than in pay. The essence of a genuine comp time bill is the creation of new options for employees, not employers. This is not such a bill. S. 4 contains four major provisions, each of which is designed not to help employees, but to allow employers to reduce the amount of money they must pay their workers.

While the legislation purports to let employees make the choice between overtime pay and comp time, it does not contain the protections that are necessary to insure that employees are free to choose and are free from reprisal.

Under S. 4, it is the employer, not the employee, who decides what forms of comp time and flex time will be available at the workplace. There is no freedom of choice for the worker.

There is nothing in this bill that prevents an employer from discriminating against a worker who refuses to take comp time instead of overtime pay. Under S. 4, an employer could lawfully deny all overtime work to those employees who want to be paid and give overtime exclusively to workers who will accept comp time in lieu of pay. This is not freedom of choice for the worker.

An employee may want a particular day off so that she can accompany her child to a special school event or to an appointment with the pediatrician. However, nothing in this legislation requires the employer to give the employee the day she requests. This bill gives the employer virtually unreviewable discretion to determine when a worker can use her accrued comp time. Here, too, there is no freedom of choice for the worker.

The failure of the Majority's bill to provide freedom of choice for the worker on these crucial issues cannot be excused an unintentional. Senator Kennedy offered an amendment which would have expressly made it unlawful for an employer to discriminate in awarding overtime based upon an employee's willingness to accept compensatory time instead of overtime pay. It was defeated 8 to 10 on a party line vote. Senator Wellstone offered an amendment affording employees the right to determine when they would take the time off which they had earned. It would have required an employer to permit employees to use accrued compensatory time for any of the reasons set forth in the FMLA, and for any other reason if the time off was requested more than two weeks in advance and the absence would not cause substantial and grievous injury to the employer's business. This, too, was rejected 8 to 10 on a party line vote. On these critical points, S. 4 does not empower workers to decide, it empowers their bosses.

S. 4 contains much more than a badly flawed comp time provision. It contains a section entitled "Biweekly Work Program" which abolishes the 40 hour workweek. The bill substitutes a provision that would allow an employer to work employees up to 80 hours in a single week without paying a cent of overtime as long as the employer gave them the next week off. Similarly, the employer could schedule employees for 60 hours one week and 20 the next—all paid at the employee's regular hourly rate. This provision gives workers nothing extra for overtime hours. Moreover, irregular and

shifting schedules are the antithesis of a family-friendly proposal. Obviously the majority has not considered the difficulties of arranging child care for such an erratic schedule.

The bill also contains a provision entitled "Flexible Credit Hours." Under this provision, an employee who works hours that are "in excess of the basic work requirement" would no longer be entitled to overtime. Instead, the employee would get an equivalent amount of hours off at a later unspecified time. Under existing law, the employee would be paid time and a half for such excess hours. Under comp time, the employee would at least receive one and one half hours of time off for every excess hour worked. However, "flexible credit hours" purports to offer the employee a new alternative—work the extra hours but receive only one hour off for each such hour worked. It is difficult to believe that any employee would choose to participate in such a plan unless he or she was given no alternative.

The last feature of this bill applies to salaried employees. Under current law, they do not receive overtime when they work extra hours and their pay cannot be cut for an absence of less than a full day. S. 4 proposes to change that rule. Salaried employees would still receive no overtime, but they could be subject to deductions in their pay if they were absent. The fact that such an employee could have pay deducted if he missed five hours of work in one week could no longer be used to prove that he was an hourly employee entitled to overtime if he worked 5 hours extra another week. This is patently unfair, and in no way enhances workers' freedom of choice.

A careful analysis of S. 4 demonstrates that its title ought to be "The Pay Reduction Act of 1997." The inevitable result of its enactment would be to require employees to work longer hours for less pay. As the acting Secretary of Labor has stated, S. 4 would "obliterate the principle of time-and-a-half for overtime" and would "destroy the 40 hour workweek."

Under this bill, employers would no longer be required to pay time and a half to hourly employees who work overtime. In fact, employers would no longer be required to pay anything for overtime work. Instead, employers could simply give an hourly employee who works overtime an IOU, promising the employee additional time off at some indeterminate time in the future. Employers would even be allowed to allocate time off at the straight time rate: an hour off for each overtime hour worked. This is not family friendly—it is a pay cut, pure and simple.

Those who earn overtime include the most vulnerable workers

The majority claims that none of these potential abuses will occur because employees must consent to any of the flexible arrangements provided in S. 4. This assertion ignores the reality that, in many workplace, employees lack of any bargaining power. They can be discharged at will by their employers and easily replaced. Employees in such workplaces—and there are millions of them across the country—cannot say "no" when they are asked to accept comp time in place of overtime pay. Indeed, the very workers who currently rely most heavily on overtime pay are the em-

ployees most vulnerable to coercion and retaliation by their employer.

Thus, to understand the real world impact of this bill, we must look at the workers who are currently depending on overtime pay to make ends meet. Overwhelmingly, they are working for low wages. Department of Labor statistics reveal that one-fourth of workers earning overtime earn under $12,000 per year. 44 percent of workers who depend on overtime earn $16,000 per year or less, and 61 percent earn $20,000 per year or less. More than 80 percent of overtime recipients have annual earnings of less than $28,000 per year. And, according to the Bureau of Labor Statistics, nearly 8 million of them are already holding more than one job just to make ends meet. 400,000 Americans, more than half of them women, are working two jobs in the food service industry. Nearly 200,000 men and women with multiple jobs work in cleaning and maintaining buildings. These are classic low-wage jobs, where workers need every dollar of pay they can earn. Furthermore, overtime pay makes up a significant percentage of many hourly workers' take-home pay. When they work overtime, manufacturing workers find that an average of nearly 15 percent of their take-home pay is attributable to the extra hours.

The workers who will be affected by this bill are hard-working, productive members of American families. They are also among the least-educated workers in the country. 43 percent of workers earning overtime have only a high school diploma. An additional 14 percent have not graduated from high school. These are people who need every dollar they can earn just to survive in today's economy. They are men and women who are supporting families. If this bill becomes law, many of them will lose overtime pay that they depend on to pay the rent, buy food, and provide clothing for their children. If this bill passes, employers will give all the overtime work to employees who agree to take comp time instead of overtime pay. There will be no overtime work for those who insist on being paid. Under S. 4, such discrimination in awarding overtime is perfectly legal.

Millions of those who rely on overtime earn only the minimum wage. By and large, these are not teenagers working jobs after school for pocket money. About 60 percent of minimum wage workers are married. They earn an average of 51 percent of their families' earnings. One-third of minimum wage earners are the sole breadwinners in their families. 60 percent are women. 2.3 million children rely on parents who earn the minimum wage—parents who hope their children don't get sick because they can't afford a doctor.

The vulnerable nature of workers who earn overtime is not a theoretical or patronizing concept. Employers violate current overtime provisions at an alarming rate. The Department of Labor conducted over 42,000 investigations under the Fair Labor Standards Act in 1996. One-third of those investigations, 13,687, disclosed overtime violations. The Department ordered over $100 million in back pay for 170,000 workers who were victims of these overtime violations. These figures do not even take into account a backlog of 16,000 unexamined complaints pending at the Department at the end of 1996.

In testimony before the Employment and Training Subcommittee on February 13, 1997, the President of the United States Chamber of Commerce characterized these 170,000 victimized employees as a "microdot" on the economy. In contrast, most of us, Republicans and Democrats alike, were shocked at the magnitude of these numbers, and the suffering they represent.

The comp time provisions of S. 4 will apply to industries where these noncompliance problems have become endemic, but S. 4 authorizes no additional funds for wage and hour enforcement. Garment workers, seasonal employees and temporary workers are all covered by this bill. Yet Department of Labor enforcement efforts find that more than half of the garment shops in the United States unlawfully pay less than the minimum wage, fail to pay overtime, or use child labor. If S. 4 becomes law, employers in these industries will use its provisions to coerce workers into accepting compensatory time instead of overtime wages.

Abuse of the overtime provisions is not restricted to fly-by-night garment shops and undocumented workers. The Employment Policy Foundation, an employer-supported research group, estimates that workers would receive an additional $19 billion each year if all employers complied with the law. The resources of the Department of Labor are already inadequate to police all the violations. Those resources certainly are not equal to the task of ensuring compliance with a far more complex set of comp time provisions.

Current law permits many flexible work schedules

According to the majority, the FLSA itself "prevents employers from accommodating employee requests for greater flexibility in scheduling." In fact, however, it is American employers, and not the law, which prevents flexible scheduling.

If employers want to provide family-friendly work schedules, they can do so today. The key is the 40-hour workweek. While employees normally work five eight-hour days a week, many more flexible arrangements are possible. A February 11, 1997 letter from the Department of Labor to Senator Kennedy provides compelling evidence of the many flexible arrangements available under current law. For example, the FLSA permits employers to schedule workers for four ten hours days a week with the fifth day off, and pay them the regular hourly rate for each hour. Under these circumstances, according to the Department of Labor, "no overtime premium pay would be due for that week." Similarly, employers can arrange a work schedule of four nine-hour days plus a four-hour day on the fifth day. Once again, states the Department of Labor, "the FLSA would not require payment of any overtime premium pay for that workweek." In addition, under current law, some employees could choose to vary their hours enough to have a three day weekend every week or every other week.

Employers also can offer genuine "flex time." This allows employers to schedule an 8-hour day around "core" hours of 10:00 A.M. to 3:00 P.M., and let employees decide whether they want to work 7:00 A.M. to 3:00 P.M. or 10:00 A.M. to 6:00 P.M. This too, costs employers not a penny more.

But the record is clear. Only a tiny fraction of employers use these or the many other flexible arrangements available under cur-

rent law. A 1991 study conducted by the Bureau of Labor Statistics found that only 10% of hourly employees are permitted to use flexible schedules. Current law offers a host of family-friendly, flexible schedules—yet few employers provide them. It is not the FLSA that prevents employers from offering employee flexibility. The problem workers confront lies not in the inflexibility of the law, but rather in the inflexibility of too many employers.

The false analogy to the public sector

To buttress their claim that S. 4 would simply enhance employee free choice, the majority relies on a supposed analogy to the public sector, where comp time has been permitted for more than a decade. The majority asserts that comp time has worked well for public employees, and then assumes that the same would be true in the private sector.

There is no evidence before this Committee as to how comp time is working in the public sector. A recent report by Professor Lonnie Golden for the Economic Policy Institute finds that, in fact, "many [public] employees carry a large number of banked comp time hours" and "have difficulty obtaining their employers' permission to use their comp time hours when they need them." As a result, Professor Golden concludes, public employees are "'loaning' hours to their employers interest free." [1]

But even if the majority's premise were sound, it would not follow that extending comp time and flexible credit hours to the private sector makes sense. For as then-Governor John Ashcroft explained in 1985, when the Senate was considering whether to permit comp time in the public sector, "State and local governments are qualitatively different in structure and in function from private business." [2] He continued, "A key distinction is that state governments do not compete with each other or the private sector. State and local government workers also are set off from their private-sector colleagues by the protection they enjoy through the government process itself. * * * An inherent distinction exists between state and local governments and private business with regard to the vital public functions state and local governments serve and the legal constraints under which they operate." Senate Labor Subcommittee Hearings at 57, 64.

Most public sector employees have some form of civil service protection, and can only be discharged or demoted for cause established at an adversarial hearing. The job security they enjoy is far greater than an employee in the private sector, who can be terminated at will by his or her employer. In addition, some 60% of public sector employees are protected by the dispute resolution procedures of collective bargaining agreements, while only about 14% of private sector workers enjoy such benefits.

Thus, even if it were true that comp time is working successfully in the public sector—and that is far from clear—it would not follow that the same would be true in the public sector.

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[1] Golden, *Family Friend or Foe? Working Time, Flexibility and the Fair Labor Standards Act* at 2 (1997).

[2] *Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources on the Fair Labor Standards Amendments of 1985,* 99th Cong. 1st Sess. 51 (1985).

The real motivation

Further, the FLSA was amended in 1985 to allow public sector comp time principally to allow state and local governments to avoid the costs of overtime pay. Historically, state and local governments had not been subject to the overtime provisions of the Fair Labor Standards Act. When that was reversed by a Supreme Court decision, those governments were faced with substantial new costs. They immediately sought relief from Congress so that they could avoid the costs of overtime pay. For example, the National League of Cities claimed at the time that, without relief, "the cost of complying with the overtime provisions of the FLSA * * * will be in excess of $1 billion for local governments."[3] The National Association of Counties reported that "It will cost States and localities in the billions of dollars to maintain current service levels under this ruling. * * * *We need flexibility to use compensatory time and volunteers as alternatives* to meeting the public's demand for increased services when we are faced with budget shortfalls." *Id.* at 204 (emphasis added). That estimate—and similar dire warnings from the States and counties—led to the enactment of comp time legislation in order, as Senator Hatch put it, "to prevent the taxpayers in every single city in America from suffering reduced services and higher taxes."[4] These candid remarks belie the pious claims now being heard that comp time is being extended to the private sector to benefit employees' families, rather than employers' balance sheets.

The real impetus for S. 4 was inadvertently betrayed by a representative of the National Federation of Independent Businesses in testimony at the Employment and Training Subcommittee hearing on February 13, 1997: "Real small businesses * * * our members cannot afford to pay their employees overtime. This is something that they can offer in exchange that gives them a benefit." Once more, the intended beneficiary is the employer, not the employee.

SECTION-BY-SECTION ANALYSIS

The majority argues that our opposition to the comp time provisions of S. 4 is unreasonable. They argue that most employers get along well with their employees, and that employers will work in a spirit of cooperation to implement a positive and non-discriminatory comp time program, even if this bill provides no explicit protections for employees rights. We agree that many employers get along well with their employees. Further, we assume that many employers desire flexible scheduling options in order to help their employees meet family obligations without putting careers at risk.

However, Congress must not make major changes in the nations' labor laws without considering their impact on all workers. Our first duty is to protect the sizable minority of employees whose rights are threatened with violation. A careful analysis of S. 4

[3] *Hearing Before the Subcommittee on Labor Standards of the House Committee on Education and Labor on the Fair Labor Standards Act,* 99th Cong. 1st Sess. at 83 (testimony of then-Mayor Voinovich) (1985).

[4] ___ Cong. Rec. 28988 (Oct. 24, 1985).

shows that it is unacceptable because it fails to include a full range of critically important protections.

COMP TIME

No guarantee that comp time will be voluntary

Supporters of S. 4 claim that the bill provides a truly voluntary system of compensatory time: a system in which comp time can only be provided when an employee agrees to accept time off instead of overtime pay. But the bill in fact provides very few safeguards to ensure that comp time programs will be truly voluntary, no language protecting employees against discrimination on the basis of their decision to earn overtime pay instead of comp time, and inadequate provisions giving employees a right to use their comp time when they actually need it.

The bill states that, for workers not represented by a union pursuant to section 9(a) of the National Labor Relations Act,[5] comp time can only be offered pursuant to "an agreement or understanding arrived at between the employer and employee," if this agreement or understanding was entered into "knowingly and voluntarily" by the employee. The bill further states that the employee must affirm in a "written or otherwise verifiable statement" that he or she has chosen to receive comp time in lieu of overtime pay.

However, the bill does not require that a comp time agreement must be provided to employees in writing, and it does not require that an employee's voluntary request to earn comp time must also be in writing. The absence of a requirement for written documentation opens a real possibility for abuse. First, if comp time agreements are not written down, employees will not be able to enforce them. The agreements will become "moving targets" that can be reinterpreted at the employer's convenience, and applied inconsistently to different employees who have substantially the same duties. Second, if an employee's voluntary request for comp time does not have to be documented in writing, then an employer can claim that an employee has requested comp time, even if the employee prefers overtime pay.

This bill is unacceptable because it cannot provide even minimal assurances that employees will enter into comp time agreements only with a complete understanding of their terms and an honest willingness to do so. At a minimum, written documentation of comp time requests and agreements must be required. Better still, the Department of Labor should be given the authority to issue regulations specifying the content of written comp time agreements. In the absence of either protective mechanism, the majority's construct is totally inadequate.

No exemption for airline, railroad or construction union contracts

As drafted, S. 4 does not apply to workforces represented by "a labor organization recognized as provided in section 9(a) of the National Labor Relations Act." This exclusion applies to many unionized workplaces, but fails to acknowledge the existence of collective

[5] As drafted, S. 4 permits employers to offer comp time programs even when doing so conflicts with existing collective bargaining agreements. See section entitled "No exemption for airline, railroad or construction unions."

bargaining relationships in many others. For example, employees in the railroad and airline industries are heavily organized—but they are covered by the Railway Labor Act, 45 U.S.C. sections 151 (railroad employees) and 182 (airline employees), and therefore are expressly excluded from coverage under the National Labor Relations Act. See 29 U.S.C. section 152(3) (excluding "any individual employed by an employer subject to the Railway Labor Act" from definition of "employee" covered under National Labor Relations Act).

Similary, workers in the construction industry have a long tradition of unionization. However, building trades unions do not typically seek or obtain recognition under section 9(a) of the National Labor Relations Act. Instead, such unions negotiate contracts with employers under section 8(f) of the NLRA, 29 U.S.C. section 158(f) (entitled "Agreement covering employees in the building and construction industry").

By its terms, this bill would permit an employer unilaterally to impose a comp time program on workers in the airline, railroad and construction industries—even if those workers were represented by a union that had negotiated a collective bargaining agreement on their behalf. An employer could bypass the union, create and implement a comp time system for employees whose collective bargaining agreement expressly prohibited such a system, and nothing in S. 4 would make this unlawful. The hundreds of thousands of workers represented by unions in these sectors should not be subjected to inconsistent and inequitable treatment, yet that is precisely what S. 4 would permit.

No bar on discriminatory practices

The bill does not include a bar on such discriminatory practices as assigning overtime work only to employees who choose comp time off instead of time-and-a-half pay. Absent a strong statutory deterrent against discrimination, many employers will distribute overtime hours only to workers who agree to take comp time instead of insisting on overtime pay. Even assuming, arguendo, that those employees who choose comp time do so voluntarily, many other employees who desire overtime pay will never get the opportunity to earn it. They will lose the overtime that they are currently earning and relying upon to support their families. For them, the freedom of choice allegedly offered by S. 4 will be in fact a cruel joke.

No exemption for vulnerable workforces

The bill does not exempt classes of employees, occupations, or industries that have the highest incidences of, and are most susceptible to, overtime violations. Nor does it allow the Government to exempt specific employers from the bill who are guilty of violating the law. This is a major flaw.

In certain industries, such as the garment industry, abuse is entrenched. The Labor Department has found that over half of the garment shops in the U.S. fail to pay overtime, use child labor, or pay less than the minimum wage. In just six months in 1996, the Labor Department assessed more than $1.5 million in back wages for labor law violations by garment firms. More than $345,000 in

civil damages were also assessed during this period. No one would reasonably suggest that the garment industry is ready for the flexibilities provided by this bill. Why isn't this industry exempted?

The National Federation of Independent Businesses testified before the Employment and Training Subcommittee that America's small businesses "can't afford to pay overtime," but that S. 4 "is something they can offer in exchange that gives [employees] a benefit." The inference could not be clearer: small business owners will pressure their employees to accept comp time instead of overtime pay. This is not an employee benefit, but rather a way for employers to cut costs.

The bill does not even exclude the most notorious employers—those with records of serious and repeated FLSA violations—from offering comp time. For those employers, S. 4 will constitute an open invitation to enage in new forms of employee abuse. This is shameful public policy.

No right to use comp time when employees need it

S. 4 provides that an employee who requests the use of comp time off shall be permitted to use the comp time "within a reasonable period," if it "does not unduly disrupt the operations of the employer." Nowhere in the bill are the terms "reasonable period" and "unduly disrupt" defined. In practice, an employee could give his employer two weeks notice of his intent to take comp time off to see his daughter's school play, and have his request denied on grounds of insufficient notice. Similarly, if an employee plans to take her child to a dentist appointment during a school vacation, her employer could claim that her use of comp time would "unduly disrupt" business operations, without even explaining why.

Compensatory time is a form of earned, accrued compensation. Employees should be able to use it on demand with a reasonable period of notification, unless its use would cause substantial and grievous injury to the employer's operations. Clearly, an employee should be able to use comp time for any of the same reasons that qualify for leave under the Family and Medical Leave Act.

This bill establishes a comp time program for hourly wage workers, who typically have little bargaining power vis-a-vis their employers. The bill fails to acknowledge this critical fact, and fails to vest employees with an express right to use comp time that they have earned at the time of their choice. The bill does not even provide that employee requests made with reasonable notice shall be granted by employers. In practice, S. 4 will result in time off being scheduled at the employer's convenience, not the employee's.

The majority clearly errs in stating that "this portion of the bill is strikingly similar to the provisions of the FMLA and the relevant regulations." The FMLA recognizes two types of medical leave—unforeseen, serious illnesses for which the employee need make no effort to accommodate the employer, and foreseeable medical treatment. In the latter situation, the employee must make a "reasonable effort" to schedule treatment at a time that doesn't "unduly disrupt" the employer's operations. If the employee's reasonable efforts fail, he or she can still take the leave despite the resulting inconvenience to the employer. The employer is expressly prohib-

ited from taking any punitive action against the employee based upon the leave.

Under the FMLA, the ultimate decision on the timing of the leave rests with the employee. In marked contrast, under S. 4, the decision rests with the employer. Management determines what is "reasonable" and when time off would be "unduly disruptive." The employee has little recourse. To claim that S. 4 is "strikingly similar" to the FMLA is grossly inaccurate.

No penalties for denying comp time

Under S. 4, if an employee gives reasonable notice that he or she intends to use comp time, and if the comp time would not disrupt the employer's operations, the employer is supposed to allow the comp time to be used. Unfortunately, the bill provides no penalties to ensure that an employer will honor reasonable requests for comp time. An employer can deny comp time for any reason, and there is nothing that the employee can do about it—even though the comp time belongs exclusively to the employee.

This is irrational, and it is inconsistent with the enforcement provisions of laws such as the Family and Medical Leave Act. If an employer denies an employee's reasonable request to take FMLA leave, the employee can recover damages, including money expended on child care and compensatory damages. The FMLA improves employee morale and productivity only because it is both credible and enforceable. This bill, by contrast, is misleading and non-enforceable.

Too many hours of comp time can be accrued

Given the danger of employer insolvency, a ceiling of 240 hours is far too high. That is six full weeks of work. For an employee earning $10 an hour, 240 hours means $2,400. That would constitute some fifteen percent of the employee's annual earnings. Even the Republicans in the House of Representatives recognized that 240 hours was unacceptably high, when they amended H.R. 1 to provide a cap of 160 hours of bankable comp time. The administration has proposed a limit of 80 hours for accrued comp time. Given the wholly inadequate safeguards in S. 4, the level of financial risk to employees must be minimized to the greatest extent possible.

No protection of accrued comp time during business failure or job loss

Accumulated compensatory time is an earned benefit, accepted instead of overtime pay. It belongs exclusively to the employee. But S. 4 does not contain sufficient protections to ensure that workers whose employers go bankrupt will have some claim on their unpaid comp time.

In 994, 845,300 American businesses filed for bankruptcy, according to the Administrative Office of the U.S. Courts. In each of the three preceding years, the number of bankruptcies was even higher: 918,700 in 1993; 972,500 in 1992; and 880,400 in 1991. Some industries are unusually susceptible to business failure. In 1994, the rate of business failure in the garment industry was 146

per 10,000 firms: twice the national average. In construction, the rate of business failure was 91 per 10,000 firms.

Since S. 4 allows employees to "bank" up to 240 hours of comp time, some workers could lose up to six weeks of pay when their companies go out of business. That's $1,440 for a worker earning $6 per hour: money for rent, food, and school clothing for the children. If a financial institution goes out of business, its customers' accounts are protected by Federal Depositors' Insurance. People who deposit their overtime earnings into a "comp time bank" deserve the same level of protection when their companies go out of business. It is unacceptable not to treat employees' accumulated compensatory time as unpaid wages during a bankruptcy.

BIWEEKLY WORK PROGRAMS AND FLEXIBLE CREDIT HOURS

Under S. 4, it is up to the employer to decide whether to offer comp time to employees. Many will opt not to do so, given that the bill also authorizes employers, in lieu of paying for overtime, to offer "biweekly work programs" and "flexible credit hour programs."

Like the comp time sections, the provisions authorizing biweekly work programs and flexible credit hours would free employers from any obligation to pay employees who work overtime. Like comp time, these programs would permit employers to substitute IOUs instead, promising time off the following week (in the case of a biweekly work program) or at some future point in time (in the case of flexible credit hour programs). But unlike comp time, employees who work overtime as part of a biweekly work program or a flexible credit hour program would earn only one hour of future time off for each overtime hour worked. In other words, these sections would effectively repeal the guarantee of premium pay—time and one-half—for overtime work. A clearer provision for cutting worker pay is difficult to imagine.

The threat that these provisions pose to the 40 hour workweek—and to stable work hours—is self-evident. The biweekly work program would permit an employer to work an employee 50, 60 or even 70 or more hours in a single week without paying a dime in overtime. The employer's only obligation would be, for every extra hour worked, to give the employee an hour off the following week. The flexible credit hour program would permit the same sort of variability in hours, and require the employer only to promise a future hour off for each overtime hour worked. There are few employees anywhere who will view such on-again, off-again work schedules as advantageous—or family friendly.

To be sure, the biweekly work programs and flexible credit hour programs purport to require employee agreement, just as comp time does. But the provisions supposedly protecting free choice suffer from all of the flaws of the provisions relating to comp time.

It bears repeating that under S. 4 it is up to the employer to decide in the first instance which types of so-called "family friendly" policies to implement. And it is difficult to understand why any employer would offer comptime—with the requirement of time-and-a-one-half off—when the employer can offer biweekly work weeks and flexible credit hours and provide only one hour off for each overtime hour worked. Thus, these provisions of the bill would, in

practice, trump the comp time provisons—and trump the requirement of time and one half for overtime work.

PAY DOCKING FOR SALARIED EMPLOYEES

The FLSA requires overtime pay only for covered ("non-exempt") employees. The Act exempts workers employed in a "bona fide executive, administrative or professional capacity." 29 U.S.C. 213(a)(1). As of 1990, the Labor Department estimated that there were 21.9 million exempt workers.[6]

For at least four decades, the Department of Labor—through Republican and Democratic administrations alike—has held the view that the FLSA exemption excludes only salaried, as distinguished from hourly, employees. The Department has likewise held the view, for over 40 years, that a salaried employee is, by definition, one who "regularly receives * * * a predetermined amount * * * which amount is not subject to reduction because of variations in the * * * quantity of the work performed."

In practical terms, this means that while salaried employees do not receive overtime when they work extra hours, they are entitled to take part of a day off, without loss of pay, when pressing family needs arise. Just a few weeks ago, the United States Supreme Court sustained the DOL's regulations and held that employees are not exempt if their pay is subject to reduction for missing part of a day's work.[7] Under current law, then, salaried employees—in lieu of receiving overtime pay—at least enjoy the flexibility that the majority claims to value so highly as a means of balancing work and family.

Remarkably, however, this so-called Family Friendly Workplace Act would take away this very flexibility for these salaried employees. S. 4 would create a new "heads-I-win, tails-you-lose" world in which a salaried employee would have no right to overtime for extra work, but could be subject to having her pay docked if the employee took an hour off to bring her child to the doctor, or to meet with the child's teacher. Indeed, under the majority's bill, an employee who worked 60, 70 or even 80 hours in a week could still suffer a pay reduction if on one day in that week the employee worked less than a full day.

Once again, then, the majority's bill turns out to be employer-friendly, but family-hostile.

DEMOCRATIC AMENDMENTS

Family and Medical Leave Act amendments—Senators Dodd and Murray

S. 4 does not solve the problems of working families. Although it purports to offer more time for employees to spend time with their families, it would actually help only a small group of employees who would qualify for compensatory time: employees who are not exempt from the FLSA; who work overtime; whose employers voluntarily agree to offer comp time; and who themselves agree to participate in the comp time program. Most importantly, S. 4 offers no guarantees to employees: it provides no meaningful penalty for

[6] Employment Standards Administration, supra n. ____, at Table 7.
[7] *Auer* v. *Robbins*, 65 U.S. L.W. 4136 (Feb. 19, 1997).

employers who deny employees' requests for comp time, and it fails to ensure that employees can use comp time when they need it.

Unlike S. 4, the FMLA expansion amendments offered by Senators Dodd and Murray would guarantee more employees more time to spend with their families. Senator Dodd's amendment would lower the threshold of the FMLA to apply to employers of at least 25 employees. Senator Murray's amendment would provide 24 hours leave per year, within the 12 weeks currently guaranteed by the FMLA, for employees to participate in children's schools activities or literacy training under a family literacy program.

Since its enactment in 1993, the FMLA has proven by a successful track record that it provides real flexibility to American employees. The FMLA guarantees covered employees 12 weeks unpaid leave each year to care for a newborn or newly adopted child or a seriously ill family member, or to recover from their own serious health conditions. It applies to employers of at least 50 employees, covering more than 57% of this country's private workforce, or more than 55 million private employees, and 66% of the entire workforce, including government employees. More than 12 million working Americans have taken family or medical leave since the FMLA became law.

Businesses have found it easy and inexpensive to comply with the FMLA. According to the bipartisan Family Leave Commission, 93.3% of covered worksites experienced no or only small increases in benefit costs; 94.8% experienced no or only small increases in hiring and training costs; 89.2% experienced no or small increases in administrative costs; and 98.5% experienced no or only small increases in other costs. In addition, 92% of covered worksites found it very or somewhat easy to determine employee eligibility; 76% found it very or somewhat easy to maintain additional records. The FMLA's success for both employees and employers is reflected in the overwhelming bipartisan support the law has received: according to the LA Times, 82% of Americans support the FMLA. However, the FMLA is not working for everyone: due to the 50-employee threshold, more than 41 million private employees—almost 43% of the private workforce—are not protected by FMLA.

By lowering the threshold to 25 employees, Senator Dodd's amendment would cover 71% of the private workforce, adding more than 13 million private employees for a total of more than 68 million private employees across the United States.

This amendment, which would provide a job-guaranteed leave to more working Americans, would not hurt businesses. The FMLA already covers small worksites that have fewer than 50 employees if those worksites are part of a larger company with at least 50 employees within a 75-mile radius. In fact, according to the Family Leave Commission, the majority of the 58,000 covered worksites of 25–49 employees found it easier to comply with the FMLA than larger employers. 93% of these worksites found it very or somewhat easy to determine worksite coverage, and 98% of these worksites found it very or somewhat easy to determine employee eligibility.

Senator Murray's amendment, which would allow employees to take leave to participate in children's school activities or literacy training under a family literacy program, would give employees the time they need to spend with their children, regardless of hours

worked overtime or agreements between employers and employees. Attending to children's education is critical to their development. Studies show that attending parent-teacher conferences may significantly influence children's academic performance. Parental involvement is more important than family education level or income in determining student success. Under current law, however, working parents have to risk losing their jobs if they take time off to do the right thing. 28% of employed parents report that they have problems getting time off to attend school activities; 23% of employed parents report problems getting time off to meet with their children's teachers. Not surprisingly, in light of those statistics, 40% of employed parents believe they aren't devoting enough time to their children's education. Further, 89% of company executives—the very groups now supporting S. 4—identified the biggest obstacle to school reform as the lack of parental involvement. Senator Murray's amendment would give parents the flexibility they need to change those sobering statistics.

A large majority—86%—of American voters support expansion of the FMLA. Yet this Committee rejected Senators Dodd's and Murray's amendments to do just that by party-line votes of 8 to 10.

Guaranteeing real employee choice—Senator Wellstone's amendment

S. 4 contains sections that are totally unacceptable in concept, such as those creating an 80-hour, biweekly work period and so-called "flexible credit hours". Those changes would cut workers' pay and undercut the basic principle of a regular 40-hour work-week, turning back the clock on essential labor protections. But the compensatory time provisions of the bill are also fundamentally flawed. Minority members of the Committee offered a number of amendments aimed at improving S. 4 in an effort to highlight these critical deficiencies, taking majority members at their word that flexibility and increased control over work schedule for employees is a desirable goal. Unfortunately, each amendment was defeated on a party-line vote, despite acknowledgement by majority members of legitimate concerns raised during debate of the amendments.

Senator Wellstone offered the first such amendment, a provision to ensure that an employee could actually use earned comp time when he or she really wants or needs to use it. With reasonable exceptions, employees should be able to use comp time at their discretion. After all, comp time is earned compensation, not vacation time or a gift from the employer. First, the amendment would have given an employee the right to use accumulated comp time for any of the reasons enumerated in the Family and Medical Leave Act, such as a serious family illness or a new child in the family. Second, the amendment would have required employers to meet a much higher standard in order to deny an employee's request to use earned comp time when the employee gives at least two weeks' notice. If the employee gave two weeks' notice, an employer could only deny the request if the employer could show that the requested time off would cause "substantial and grievous" injury to the business. Finally, if an employee gave less than two weeks' notice of an intent to use comp time, the amendment permitted an employer to deny that request if granting it would "unduly disrupt" the employer's operation.

The majority rejected this amendment, which goes to the heart of whether comp time is actually intended to provide flexibility to employees, on a party-line vote. The majority thereby demonstrated that S. 4 apparently is not intended to allow employees real flexibility. If an employee cannot take earned time off on short notice in case of a family illness, and cannot plan in advance to use earned comp time, then where is the choice and flexibility for employees and their families which the bill purports to offer? If an employer can decide when the employee can use earned comp time, the bill not only reserves flexibility exclusively for employers, it creates a new ability for employers actually to delay providing earned compensation for hours previously worked by denying use of earned comp time for non-substantial reasons.

Ensuring nondiscrimination—Senator Kennedy's amendment

Senator Ashcroft, the principal sponsor of S. 4, testified before the Subcommittee on Employment and Job Training on February 13, 1997 that "to safeguard against abuse, this bill would prohibit an employer from forcing employees to accept compensatory time off in lieu of financial compensation. * * * This bill in no way alters the 40 hour work week [because] no employee can be forced to work such a [flexible] schedule nor could working flexible schedules be made a condition of employment."

Senator Ashcroft also conceded that abuses of flexible schedules can only be deterred by strong enforcement provisions in the bill itself. Accordingly, in the same hearing, he called for quadruple damages for employers who violate the provisions of S. 4: "If the employee says, No thanks; I like 40 hours a week, and if you intimidate me into doing this, there are quadruple penalties for you * * *"

But the actual text of S. 4 provides no quadruple damages for violators, despite Senator Ashcroft's stated preference for them. Worst of all, the bill fails to prohibit employers from discriminating against workers for their choice of overtime pay instead of comp time. As drafted, the bill gives an employer the option to assign overtime hours only to workers who express a preference for comp time, and cut off all overtime hours for workers who would prefer to earn overtime pay. Since it is predominantly low-wage workers who rely on overtime to make ends meet, this bill is, in effect, a pay cut for low-wage workers. Employers can tell their workers, "from now on, all the overtime hours will go to people who choose comp time. Overtime pay no longer exists." Unfortunately, under S. 4, such conduct would not be illegal.

Senator Kennedy's amendment would have accomplished what the Republican leadership said they wanted their bill to do—prevent discrimination and deter violations of the labor law. The amendment would have prohibited employers from distributing overtime hours solely to employees who express a preference for comp time. Further, the amendment actually provided for quadruple damages for violations. Despite Senator Ashcroft's representations, his bill in fact did not. Notwithstanding their self-righteous rhetoric, the members of the Committee majority refused in a party-line vote to provide either genuine protection against discrimination or true quadruple damages.

Comp time hours constitute hours worked—Senator Wellstone's amendment

Senator Wellstone offered a second amendment, intended like his first one to make the bill's comp time provisions operate in a way that would be beneficial to employees—not just to employers. The amendment sought to ensure that comp time would be treated as "hours worked" for the purpose of calculating an employee's entitlement both to overtime and to certain employee benefits that are tied to the number of hours worked. The need for such an amendment is obvious, if the intent of comp time is not to cut workers' pay or reduce their benefits. Take the example of a worker who decides to use eight accumulated hours of comp time in order to enjoy a 3-day weekend by taking a Monday off. Without the amendment, no provision in the bill or in law would prevent an employer from requiring that employee to work 10-hour days Tuesday through Friday without paying overtime because only 40 hours would have been counted as worked. The employee would have been denied what should be considered earned overtime, as well as the "flexibility" promised by supporters of the bill. The supposedly previously-earned comp day off would have served only to increase the employee's hours worked on other days in the same week.

The need to count comp time when used as hours worked for the purpose of calculating employee benefits is equally clear. In many industries, employers and employees make contributions to an employee's pension plan for each hour that the employee works. Such arrangements are particularly common in industries characterized by multi-employer pension plans, such as the construction industry. Overtime hours are considered hours worked for purposes of making contributions under such plans. If S. 4 becomes law, however, comp time hours when used will not be counted toward such employees' pension benefit. In short, workers taking comp time not only will lose overtime pay, but they will suffer a reduction in pension benefits as well.

The majority argues weakly that, under current law, vacation time is not counted as hours worked when calculating overtime and other employee benefits. This is both irrelevant and insulting. Comp time off is not vacation time. It is earned compensation. The majority's equation of the two reflects either a fundamental misunderstanding of their own bill, or yet another disingenuous attempt to reduce employees' compensation. Regardless of the motive, the outcome was the same: another partyline vote against the amendment.

Excluding vulnerable employees—Senator Wellstone's amendment

The third Wellstone amendment was yet another effort to improve the employee protections in the bill. It would have excluded from coverage under S. 4 workers who would be particularly vulnerable to exploitation should comp time be offered as a tool to their employers. It would have excluded part-time, seasonal and temporary employees, as well as employees in the garment industry. Workers in these sectors generally do not enjoy a relationship of equal power with their employers. The voluntariness of the comp time "option" would be extremely questionable. Unscrupulous em-

ployers would gain too many new opportunities to exploit or deny earned pay and benefits to workers in these sectors.

The garment industry is particularly illustrative. In 1996, the Department of Labor's Wage and Hour Division undertook a compliance survey among garment contractor shops in the Los Angeles area. The survey found that 55 percent of the shops were failing to honor current overtime requirements. The Department of Labor reports that overtime violations in the garment industry have totalled nearly $12 million since 1992, affecting over 32,000 garment workers and averaging roughly $375 in lost wages per worker. These are cases that have been identified and remedied. The Department of Labor estimates that minimum wage and overtime violations prevail in more than 50 percent of the 22,000 American apparel industries. It would be unconscionable to give employers in this industry another opportunity to deny hard-earned pay to their employees—yet that is precisely what the majority did, in still another party-line vote.

Delay implementation until enforcement resources available—Senator Wellstone's amendment

Senator Ashcroft admitted to the Employment and Training Subcommittee that adequate enforcement resources were essential in order to implement his bill properly. The fourth Wellstone amendment, also defeated, took this representation seriously. Noting that the current backlog of complaints in the Department of Labor's Wage and Hour Division is approximately 40 percent of the annual number of complaints, Senator Wellstone proposed delaying implementation of the bill until the backlog could be reduced to 10 percent. The Wage and Hour Division is responsible for investigating and remedying most reported violations of the FLSA. It receives approximately 40,000 complaints annually, and managed in 1996 to reduce its backlog to approximately 16,000. Assuming that complaints would likely increase with new opportunities for disputes regarding earned comp time, and noting that justice delayed can often be justice denied for employees in such cases, minority members found it reasonable to require that adequate enforcement resources be in place before the bill could be implemented. Once again, however, the majority failed to conform its actions to its words. The amendment was defeated along straight party lines.

CONCLUSION

This bill is totally unacceptable, for all the reasons described above. Even those who believe that a genuine comp time bill is an appropriate legislative goal must stand in opposition to this bill. President Clinton, for one, has endorsed the concept of comp time. However, he has stated that he would be forced to veto S. 4. The Department of Labor effectively conveyed the President's views on the failings of this legislation in a letter sent to the Committee Chairman before the markup of S. 4. While its full text is appended to this report, the following excerpt succinctly identifies the bill's deficiencies:

> Any comp time legislation must effectively and satisfactorily address three fundamental principles: real choice for

> employees; real protection against employer abuse; and preservation of basic worker rights, including the 40-hour work week. President Clinton will veto any bill that does not meet these fundamental principles. . . . While the President has called for and strongly supports enactment of responsible comp time legislation, he will not sign *any* bill—including S. 4—that obliterates the principle of time-and-a-half for overtime or that destroys the 40-hour work-week. Workers—not employers—must be able to decide how best to meet the current needs of their family.

For these and all the foregoing reasons, we urge our colleagues to oppose this legislation.

EDWARD M. KENNEDY.
CHRIS DODD.
TOM HARKIN.
BARBARA A. MIKULSKI.
JEFF BINGAMAN.
PAUL D. WELLSTONE.
PATTY MURRAY.
JACK REED.

APPENDIX TO S.4 MINORITY VIEWS

U.S. DEPARTMENT OF LABOR,
SECRETARY OF LABOR,
Washington, DC, February 26, 1997.

Hon. JAMES M. JEFFORDS,
Chairman, Committee on Labor and Human Resources,
Washington, DC.

DEAR CHAIRMAN JEFFORDS: We understand that your Committee will consider S. 4, the "Family Friendly Workplace Act," on Wednesday, February 26. I am writing to emphasize the Administration's strong opposition to S. 4, and to urge your Committee not to order the bill reported.

The Administration believes strongly that any legislation to authorize compensatory time—"comp time," or paid time-off—under the Fair Labor Standards Act (FLSA) should be linked to expansion of the Family and Medical Leave Act (FMLA), as the President proposed during the last Congress. The FMLA provides important benefits to working families and has proved effective in meeting the needs of both families and businesses. And, unlike comp time which would be optional, family and medical leave is a right that covered employers may not deny to eligible employees. Expanding FMLA to give working families the flexibility they need for greater involvement in the education of their children and elder care will go a long way toward achieving the stated goals of S. 4. The bill before your Committee does not include FMLA expansion, and it should.

Any comp time legislation must effectively and satisfactorily address three fundamental principles: real choice for employees; real protection against employer abuse; and preservation of basic worker rights, including the 40-hour workweek.

Real choice for employees must include the right to choose whether to earn comp time or overtime premium pay; the right to take comp time when needed for FMLA purposes; the right to choose to use comp time for any purpose with two weeks notice unless its use would cause substantial injury to the employer; and the right to "cash out" accrued comp time for pay on 15 days notice, as well as a prohibition against giving employers the unilateral right to cash out an employee's accrued comp time at their discretion. Real protection against employer abuse must include a number of protections that are entirely absent from S. 4, such as the exclusion of vulnerable workers; special protection in cases where the employer goes bankrupt or out-of-business; prohibitions against employers' substituting comp time for paid vacation or sick leave benefits, or penalizing employees who choose overtime premium pay instead of comp time; damages that allow an employee to obtain adequate relief if denied the use of comp time or denied overtime assignments; and strong effective provisions for enforcement. Preservation of worker rights requires preserving the 40-hour workweek, the right to receive premium pay for overtime work, and the cardinal FLSA principle that overtime is earned whenever an employer knows or has reason to know that overtime is being worked. Several provisions of S. 4., including the 80-hour biweekly

work program and the flexible credit hour program, could effectively eliminate these rights.

President Clinton will veto any bill that does not meet these fundamental principles. While the President has called for and strongly supports enactment of responsible comp time legislation, he will not sign *any* bill—including S. 4—that obliterates the principle of time-and-a-half for overtime or that destroys the 40-hour workweek. Workers—not employers—must be able to decide how best to meet the current needs of their family.

The Office of Management and Budget advises that there is no objection to the submission of this report.

Sincerely,

CYNTHIA A. METZLER,
Acting Secretary of Labor.

XI. CHANGES IN EXISTING LAW

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FAMILY FRIENDLY WORKPLACE ACT

* * * * * * *

TITLE 29—UNITED STATES CODE

* * * * * * *

SEC. 13. POWERS AND DUTIES OF BUREAU.

It shall * * *

* * * * * * *

SEC. 13A. BIWEEKLY WORK PROGRAMS AND FLEXIBLE CREDIT HOUR PROGRAMS.

(a) VOLUNTARY PARTICIPATION.—

(1) IN GENERAL.—Except as provided in paragraph (2), no employee may be required to participate in a program described in this section. Participation in a program described in this section may not be a condition of employment.

(2) COLLECTIVE BARGAINING AGREEMENT.—In a case in which a valid collective bargaining agreement exists, an employee may only be required to participate in such a program in accordance with the agreement.

(b) BIWEEKLY WORK PROGRAMS.—

(1) IN GENERAL.—Notwithstanding section 7, an employer may establish biweekly work programs that allow the use of a biweekly work schedule—

(A) that consists of a basic work requirement of not more than 80 hours, over a 2-week period; and

(B) in which more than 40 hours of the work requirement may occur in a week of the period.

(2) CONDITIONS.—An employer may carry out a biweekly work program described in paragraph (1) for employees only pursuant to the following:

(A) AGREEMENT OR UNDERSTANDING.—The program may be carried out only in accordance with—

(i) applicable provisions of a collective bargaining agreement between the employer and the representative of the employees that is recognized as provided for in section 9(a) of the National Labor Relations Act (29 U.S.C. 159(a)); or

(ii) in the case of an employee who is not represented by a labor organization that is recognized as provided for in section 9(a) of the National Labor Relations Act, an agreement or understanding arrived at between the employer and employee before the performance of the work involved if the agreement or understanding was entered into knowingly and voluntarily by such employee and was not a condition of employment.

(B) STATEMENT.—The program shall apply to an employee described in subparagraph (A)(ii) if such employee has affirmed, in a written or otherwise verifiable statement that is made, kept, and preserved in accordance with section 11(c), that the employee has chosen to participate in the program.

(3) COMPENSATION FOR HOURS IN SCHEDULE.—Notwithstanding section 7, in the case of an employee participating in such a biweekly work program, the employee shall be compensated for each hour in such a biweekly work schedule at a rate not less than the regular rate at which the employee is employed.

(4) COMPUTATION OF OVERTIME.—All hours worked by the employee in excess of such a biweekly work schedule or in excess of 80 hours in the 2-week period, that are requested in advance by the employer, shall be overtime hours.

(5) OVERTIME COMPENSATION PROVISION.—The employee shall be compensated for each such overtime hour at a rate not less than one and one-half times the regular rate at which the employee is employed, in accordance with section 7(a)(1), or receive compensatory time off in accordance with section 7(r) for each such overtime hour.

(6) DISCONTINUANCE OF PROGRAM OR WITHDRAWAL.—

(A) DISCONTINUANCE OF PROGRAM.—An employer that has established a biweekly work program under paragraph (1) may discontinue the program for employees described in paragraph (2)(A)(ii) after providing 30 days' written notice to the employees who are subject to an agreement or understanding described in paragraph (2)(A)(ii).

(B) WITHDRAWAL.—An employee may withdraw an agreement or understanding described in paragraph (2)(A)(ii) at the end of any 2-week period described in paragraph (1)(A), by submitting a written notice of withdrawal to the employer of the employee.

(c) FLEXIBLE CREDIT HOUR PROGRAMS.—

(1) IN GENERAL.—Notwithstanding section 7, an employer may establish flexible credit hour programs, under which, at the election of an employee, the employer and the employee jointly designate hours for the employee to work that are in excess of the basic work requirement of the employee so that the employee can accrue flexible credit hours to reduce the hours worked in a week or a day subsequent to the day on which the flexible credit hours are worked.

(2) CONDITIONS.—An employer may carry out a flexible credit hour program described in paragraph (1) for employees only pursuant to the following:

(A) AGREEMENT OR UNDERSTANDING.—The program may be carried out only in accordance with—

(i) applicable provisions of a collective bargaining agreement between the employer and the representative of the employees that is recognized as provided for in section 9(a) of the National Labor Relations Act (29 U.S.C. 159(a)); or

(ii) in the case of an employee who is not represented by a labor organization that is recognized as provided for in section 9(a) of the National Labor Relations Act, an agreement or understanding arrived at between the employer and employee before the performance of the work involved if the agreement or understanding was entered into knowingly and voluntarily by such employee and was not a condition of employment.

(B) STATEMENT.—The program shall apply to an employee described in subparagraph (A)(ii) if such employee has affirmed, in a written or otherwise verifiable statement that is made, kept, and preserved in accordance with section 11(c), that the employee has chosen to participate in the program.

(C) HOURS.—An agreement or understanding that is entered into under subparagraph (A) shall provide that, at the election of an employee, the employer and the employee will jointly designate, for an applicable workweek, flexible credit hours for the employee to work.

(D) LIMIT.—An employee shall be eligible to accrue flexible credit hours if the employee has not accrued flexible credit hours in excess of the limit applicable to the employee prescribed by paragraph (3).

(3) HOUR LIMIT.—

(A) MAXIMUM HOURS.—An employee who is participating in such a flexible credit hour program may accrue not more than 50 flexible credit hours.

(B) COMPENSATION DATE.—Not later than January 31 of each calendar year, the employer of an employee who is participating in such a flexible credit hour program shall provide monetary compensation for any flexible credit hours accrued during the preceding calendar year that were not used prior to December 31 of the preceding calendar year at a rate not less than the regular rate at which the employee is employed on the date the employee receives the compensation. An employer may designate and communicate to the employees of the employer a 12-month period other than the calendar year, in which case the compensation shall be provided not later than 31 days after the end of the 12-month period.

(4) COMPENSATION FOR FLEXIBLE CREDIT HOURS.—Notwithstanding section 7, in the case of an employee participating in such a flexible credit hour program, the employee shall be compensated for each flexible credit hour at a rate not less than the regular rate at which the employee is employed.

(5) COMPUTATION OF OVERTIME.—All hours worked by the employee in excess of 40 hours in a week that are requested in

advance by the employer, other than flexible credit hours, shall be overtime hours.

(6) OVERTIME COMPENSATION PROVISION.—The employee shall be compensated for each such overtime hour at a rate not less than one and one-half times the regular rate at which the employee is employed, in accordance with section 7(a)(1), or receive compensatory time off in accordance with section 7(r) for each such overtime hour.

(7) USE OF TIME.—An employee—

(A) who has accrued flexible credit hours; and

(B) who has requested the use of the accrued flexible credit hours,

shall be permitted by the employer of the employee to use the accrued flexible credit hours within a reasonable period after making the request if the use of the accrued flexible credit hours does not unduly disrupt the operations of the employer.

(8) DISCONTINUANCE OF PROGRAM OR WITHDRAWAL.—

(A) DISCONTINUANCE OF PROGRAM.—An employer that has established a flexible credit hour program under paragraph (1) may discontinue the program for employees described in paragraph (2)(A)(ii) after providing 30 days' written notice to the employees who are subject to an agreement or understanding described in paragraph (2)(A)(ii).

(B) WITHDRAWAL.—An employee may withdraw an agreement or understanding described in paragraph (2)(A)(ii) at any time, by submitting a written notice of withdrawal to the employer of the employee. An employee may also request in writing that monetary compensation be provided, at any time, for all flexible credit hours accrued that have not been used. Within 30 days after receiving the written request, the employer shall provide the employee the monetary compensation due at a rate not less than the regular rate at which the employee is employed on the date the employee receives the compensation.

(d) PROHIBITION OF COERCION.—

(1) IN GENERAL.—An employer shall not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any employee for the purpose of—

(A) interfering with the rights of the employee under this section to elect or not to elect to work a biweekly work schedule;

(B) interfering with the rights of the employee under this section to elect or not to elect to participate in a flexible credit hour program, or to elect or not to elect to work flexible credit hours (including working flexible credit hours in lieu of overtime hours);

(C) interfering with the rights of the employee under this section to use accrued flexible credit hours in accordance with subsection (c)(7); or

(D) requiring the employee to use the flexible credit hours.

(2) DEFINITION.—In paragraph (1), the term "intimidate, threaten, or coerce" includes promising to confer or conferring any benefit (such as appointment, promotion, or compensation)

or effecting or threatening to effect any reprisal (such as deprivation of appointment, promotion, or compensation).

(e) DEFINITIONS.—In this section:

(1) BASIC WORK REQUIREMENT.—The term "basic work requirement" means the number of hours, excluding overtime hours, that an employee is required to work or is required to account for by leave or otherwise.

(2) COLLECTIVE BARGAINING.—The term "collective bargaining" means the performance of the mutual obligation of the representative of an employer and the representative of employees of the employer that is recognized as provided for in section 9(a) of the National Labor Relations Act (29 U.S.C. 159(a)) to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph shall not compel either party to agree to a proposal or to make a concession.

(3) COLLECTIVE BARGAINING AGREEMENT.—The term "collective bargaining agreement" means an agreement entered into as a result of collective bargaining.

(4) ELECTION.—The term "at the election of", used with respect to an employee, means at the initiative of, and at the request of, the employee.

(5) EMPLOYEE.—The term "employee" does not include an employee of a public agency.

(6) EMPLOYER.—The term "employer" does not include a public agency.

(7) FLEXIBLE CREDIT HOURS.—The term "flexible credit hours" means any hours, within a flexible credit hour program established under subsection (c), that are in excess of the basic work requirement of an employee and that, at the election of the employee, the employer and the employee jointly designate for the employee to work so as to reduce the hours worked in a week or a day subsequent to the day on which the flexible credit hours are worked.

(8) OVERTIME HOURS.—The term "overtime hours"—

(A) when used with respect to biweekly work programs under subsection (b), means all hours worked in excess of the biweekly work schedule involved or in excess of 80 hours in the 2-week period involved, that are requested in advance by an employer; or

(B) when used with respect to flexible credit hour programs under subsection (c), means all hours worked in excess of 40 hours in a week that are requested in advance by an employer, but does not include flexible credit hours.

(9) REGULAR RATE.—The term "regular rate" has the meaning given the term in section 7(e).

* * * * * * *

SEC. 207. MAXIMUM HOURS.

(a) EMPLOYEES ENGAGED IN INTERSTATE COMMERCE; ADDITIONAL APPLICABILITY TO EMPLOYEES PURSUANT TO SUBSEQUENT AMENDATORY PROVISIONS.—

*(1) EXCEPT * * **

* * * * * * *

(r) COMPENSATORY TIME OFF FOR PRIVATE EMPLOYEES.—

(1) VOLUNTARY PARTICIPATION.—

(A) IN GENERAL.—Except as provided in subparagraph (B), no employee may be required under this subsection to receive compensatory time off in lieu of monetary overtime compensation. The acceptance of compensatory time off in lieu of monetary overtime compensation may not be a condition of employment.

(B) COLLECTIVE BARGAINING AGREEMENT.—In a case in which a valid collective bargaining agreement exists between an employer and the representative of the employees that is recognized as provided for in section 9(a) of the National Labor Relations Act (29 U.S.C. 159(a)), an employee may only be required under this subsection to receive compensatory time off in lieu of monetary overtime compensation in accordance with the agreement.

(2) GENERAL RULE.—

(A) COMPENSATORY TIME OFF.—An employee may receive, in accordance with this subsection and in lieu of monetary overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which monetary overtime compensation is required by this section.

(B) DEFINITIONS.—In this subsection:

(i) EMPLOYEE.—The term "employee" does not include an employee of a public agency.

(ii) EMPLOYER.—The term "employer" does not include a public agency.

(3) CONDITIONS.—An employer may provide compensatory time off to employees under paragraph (2)(A) only pursuant to the following:

(A) The compensatory time off may be provided only in accordance with—

(i) applicable provisions of a collective bargaining agreement between the employer and the representative of the employee that is recognized as provided for in section 9(a) of the National Labor Relations Act (29 U.S.C. 159(a)); or

(ii) in the case of an employee who is not represented by a labor organization that is recognized as provided for in section 9(a) of the National Labor Relations Act, an agreement or understanding arrived at between the employer and employee before the performance of the work involved if the agreement or understanding was entered into knowingly and voluntarily by such employee and was not a condition of employment.

(B) The compensatory time off may only be provided to an employee described in subparagraph (A)(ii) if such em-

ployee has affirmed, in a written or otherwise verifiable statement that is made, kept, and preserved in accordance with section 11(c), that the employee has chosen to receive compensatory time off in lieu of monetary overtime compensation.

(C) An employee shall be eligible to accrue compensatory time off if such employee has not accrued compensatory time off in excess of the limit applicable to the employee prescribed by paragraph (4).

(4) HOUR LIMIT.—

(A) MAXIMUM HOURS.—An employee may accrue not more than 240 hours of compensatory time off.

(B) COMPENSATION DATE.—Not later than January 31 of each calendar year, the employer of the employee shall provide monetary compensation for any unused compensatory time off accrued during the preceding calendar year that was not used prior to December 31 of the preceding calendar year at the rate prescribed by paragraph (8). An employer may designate and communicate to the employees of the employer a 12-month period other than the calendar year, in which case the compensation shall be provided not later than 31 days after the end of the 12-month period.

(C) EXCESS OF 80 HOURS.—The employer may provide monetary compensation for an employee's unused compensatory time off in excess of 80 hours at any time after providing the employee with at least 30 days' written notice. The compensation shall be provided at the rate prescribed by paragraph (8).

(5) DISCONTINUANCE OF POLICY OR WITHDRAWAL.—

(A) DISCONTINUANCE OF POLICY.—An employer that has adopted a policy offering compensatory time off to employees may discontinue the policy for employees described in paragraph (3)(A)(ii) after providing 30 days' written notice to the employees who are subject to an agreement or understanding described in paragraph (3)(A)(ii).

(B) WITHDRAWAL.—An employee may withdraw an agreement or understanding described in paragraph (3)(A)(ii) at any time, by submitting a written notice of withdrawal to the employer of the employee. An employee may also request in writing that monetary compensation be provided, at any time, for all compensatory time off accrued that has not been used. Within 30 days after receiving the written request, the employer shall provide the employee the monetary compensation due in accordance with paragraph (8).

(6) ADDITIONAL REQUIREMENTS.—

(A) PROHIBITION OF COERCION.—

(i) IN GENERAL.—An employer that provides compensatory time off under paragraph (2) to an employee shall not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any employee for the purpose of—

(I) interfering with the rights of the employee under this subsection to request or not request

compensatory time off in lieu of payment of monetary overtime compensation for overtime hours;

(II) interfering with the rights of the employee to use accrued compensatory time off in accordance with paragraph (9); or

(III) requiring the employee to use the compensatory time off.

(ii) DEFINITION.—In clause (i), the term 'intimidate, threaten, or coerce' has the meaning given the term in section 13A(d)(2).

(B) ELECTION OF OVERTIME COMPENSATION OR COMPENSATORY TIME.—An agreement or understanding that is entered into by an employee and employer under paragraph (3)(A)(ii) shall permit the employee to elect, for an applicable workweek—

(i) the payment of monetary overtime compensation for the workweek; or

(ii) the accrual of compensatory time off in lieu of the payment of monetary overtime compensation for the workweek.

(7) TERMINATION OF EMPLOYMENT.—An employee who has accrued compensatory time off authorized to be provided under paragraph (2) shall, upon the voluntary or involuntary termination of employment, be paid for the unused compensatory time off in accordance with paragraph (8).

(8) RATE OF COMPENSATION FOR COMPENSATORY TIME OFF.—

(A) GENERAL RULE.—If compensation is to be paid to an employee for accrued compensatory time off, the compensation shall be paid at a rate of compensation not less than—

(i) the regular rate received by such employee when the compensatory time off was earned; or

(ii) the final regular rate received by such employee, whichever is higher.

(B) CONSIDERATION OF PAYMENT.—Any payment owed to an employee under this subsection for unused compensatory time off shall be considered unpaid monetary overtime compensation.

(9) USE OF TIME.—An employee—

(A) who has accrued compensatory time off authorized to be provided under paragraph (2); and

(B) who has requested the use of the accrued compensatory time off,

shall be permitted by the employer of the employee to use the accrued compensatory time off within a reasonable period after making the request if the use of the accrued compensatory time off does not unduly disrupt the operations of the employer.

(10) DEFINITIONS.—The terms 'monetary overtime compensation' and 'compensatory time off' shall have the meanings given the terms 'overtime compensation' and 'compensatory time', respectively, by subsection (o)(7).

* * * * * * *

SEC. 213. EXEMPTIONS.

*(a) The provisions * * **

* * * * * * *

(m)(1)(A) In the case of a determination of whether an employee is an exempt employee described in subsection (a)(1), the fact that the employee is subject to deductions in compensation for—

(i) absences of the employee from employment of less than a full workday; or

(ii) absences of the employee from employment of less than a full pay period,

shall not be considered in making such determination.

(B) In the case of a determination described in subparagraph (A), an actual reduction in pay of the employee may be considered in making the determination for that employee.

(C) For the purposes of this paragraph, the term 'actual reduction in compensation' does not include any reduction in accrued paid leave, or any other practice, that does not reduce the amount of pay an employee receives for a pay period.

(2) The payment of overtime compensation or other additions to the compensation of an employee employed on a salary based on hours worked shall not be considered in determining if the employee is an exempt employee described in subsection (a)(1).

* * * * * * *

SEC. 215. PROHIBITED ACTS; PRIMA FACIE EVIDENCE.

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

*(1) * * **

* * * * * * *

(3)(A) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; or

(B) to violate any of the provisions of section 13A;

* * * * * * *

SEC. 216. PENALTIES.

(a) FINES AND IMPRISONMENT.—

(f)(1) In addition to any amount that an employer is liable under subsection (b) for a violation of a provision of section 7, an employer that violates section 7(r)(6)(A) shall be liable to the employee affected in an amount equal to—

(A) the product of—

(i) the rate of compensation (determined in accordance with section 7(r)(8)(A)); and

(ii)(I) the number of hours of compensatory time off involved in the violation that was initially accrued by the employee; minus

(II) the number of such hours used by the employee; and

(B) as liquidated damages, the product of—

(i) such rate of compensation; and

(ii) the number of hours of compensatory time off involved in the violation that was initially accrued by the employee.

(2) The employer shall be subject to such liability in addition to any other remedy available for such violation under this section or section 17, including a criminal penalty under subsection (a) and a civil penalty under subsection (e).

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